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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

WILLIAM FRENCH SMITH,
634 South Spring Street,
Los Angeles, Calif. 90014,
Counsel for Petitioners.

SAMUEL O. PRUITT, JR.,
CHARLES S. BATTLES, JR.
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioners[1] pray that a writ of certiorari issue to review the judgments of the Supreme Court of the State of California in *Mulkey, et al. v. Reitman, et al.* and *Prendergast, et al. v. Snyder,* which became final in the Court below upon denial of rehearings on June 8, 1966.

Citations to Opinions Below.

The majority opinion of the Supreme Court of California in *Mulkey, et al. v. Reitman, et al.* (printed at page 35 in the separate Appendix filed concurrently

[1]Petitioners are the defendants Neil Reitman, the owner of the apartment dwelling involved in the *Mulkey* case and his agents Mr. and Mrs. Herman Straesser, and Peggy Watson, and the defendant Clarence Snyder in the *Prendergast* case. The judgments below involved substantially the same federal constitutional issues and accordingly we submit a single petition.

herewith, and abbreviated herein as App.), is reported in (1966), 64 Cal. 2d —, 50 Cal. Rptr. 881. Two dissenting opinions [R. Mulk., III, IV; App. 57 and 78] are reported in 64 Cal. 2d —; 50 Cal. Rptr. at 892 and 901.

The memorandum opinion of the Superior Court of Los Angeles County in *Prendergast v. Snyder* is unreported (App. 79). The majority opinion of the Supreme Court of California (App. 87) is reported in (1966), 64 Cal. 2d —, 50 Cal. Rptr. 903. Two justices dissented [R. Prend., III; App. 90, 64 Cal. 2d —, 50 Cal. Rptr. at 905].

Jurisdiction.

The judgments below were entered on May 10, 1966 [R. Mulk., III; R. Prend., II]. A timely petition for rehearing was denied on June 8, 1966 [R. Mulk., VII; R. Prend., V]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) to review judgments declaring a state constitutional provision invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[2]

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 26 of Article I of the California Constitution, adopted as an initiative measure (Proposition 14) at the general election on November 3, 1964, by a popular vote of 4,526,460 to 2,395,747. The full text of that measure, together with the official ballot arguments, are submitted herewith (App.

[2]Referred to hereinafter, for brevity, as the equal protection clause.

1) as are the pertinent provisions establishing the initiative powers contained in Article IV, Section 1 of the California Constitution (App. 9).

The operative portion of Section 26 of Article I provides:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The balance of the measure defines "person" so as to exclude the State and its subdivisions, defines "real property" as residential property, excludes public accommodations, and sets forth a severability clause (App. 1-2).

Statutes involved are (i) California Civil Code, Sections 51 and 52 (App. 9) as amended in 1959, which will be referred to herein as by the Court below as the "Unruh Act" and (ii) California Health and Safety Code, Sections 35,700 *et seq.* adopted in 1963 (material portions printed at App. 11), which will be referred to herein as by the Court below as the "Rumford Act".

Questions Presented.

1. Does the adoption of a state constitutional amendment providing that the state shall not deny the right of an owner of private residential property to decline to sell or rent his property to such person as he chooses, sufficiently involve the state in the private conduct of an individual who refuses to lease his property on grounds of race so as to violate the equal protection clause?

2. Does the equal protection clause itself create an affirmative obligation upon a state to prohibit or provide a remedy against, or preclude a state from repealing statutory remedies against, racial discrimination in the sale or rental of privately-owned residential property.?

3. Does the equal protection clause itself require a state to deny judicial recognition of a landlord's right to possession of his property solely on the ground that he acquired or exercised such right because of the race of his tenant?

4. Does a state court deprive a landlord of his property without due process of law, or deny him the equal protection of the laws, by refusing, upon the basis of the equal protection clause itself, to recognize or enforce a right to possession available to all landlords, solely on the ground that he acquired or exercised his right to possession because of the race of his tenant?

5. Does the judiciary, state or federal, have the power to invalidate under the equal protection clause a popularly enacted initiative amendment to a state constitution which establishes a policy of nonregulation of private conduct which the state may, but is not required, to regulate?

Statement of the Cases.

Both judgments sought to be reviewed are based squarely on the proposition that Section 26 of Article I of the California Constitution violates the Fourteenth Amendment to the Federal Constitution[3] [R. Mulk., II-

[3]Thus the California Court said: "Our resolution of the question of constitutionality [of Section 26, Article I] is confined solely to federal constitutional considerations." (64 A.C. at p. 561, 50 Cal. Rptr. at p. 884, App. 38-39); and later: "We are

5; R. Prend., II-4]. The judgment in *Pendergast* was based on the additional ground that the Court was barred by the Fourteenth Amendment from giving any relief to a landlord who exercised his right to terminate an oral tenancy on the grounds his tenant was a Negro [R. Prend., I-33, II-4].

There is no factual dispute. In each case judgment was rendered for a Negro plaintiff in actions against a white landlord who had refused on grounds of the plaintiff's race to rent, or to continue to rent, privately-owned residential property.[4] The material proceedings in each case were:

1. Mulkey v. Reitman.

This was an action for damages and injunctive relief commenced in 1963 under the provisions of the Unruh Act against the owner of an apartment building for refusal to rent an apartment to plaintiffs solely because they were Negroes [R. Mulk., II-1-3]. Following the subsequent adoption of Section 26 of Article I of the California Constitution, the trial court dismissed the action on defendants' motion, solely upon the ground that the latter provision rendered the statutes "upon

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now confronted with those questions", *i.e.*, "'grave questions whether the . . . amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution.'" (64 A.C. at p. 563, 50 Cal. Rptr. at p. 885, App. 41). Further: "Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the federal Constitution, and is void in its general application." (64 A.C. at p. 573, 50 Cal. Rptr. at p. 892, App. 57).

[4]In a related decision, *Hill v. Miller*, 64 Cal. 2d —, 51 Cal. Rptr. 689, App. 91, the Court below rendered judgment for the landlord of a single family residence. As will appear, this decision is essential to an understanding of the precise basis of decision of the Court below in the cases here sought to be reviewed.

which this action is based null and void." [R. Mulk., II-3]. Plaintiffs unsuccessfully opposed the motion solely on the ground that Section 26, Article I, was unconstitutional under the state and federal Constitutions. The Supreme Court of California, with two justices dissenting, reversed, placing its decision entirely upon the ground that Section 26, Article I, contravened the equal protection clause (App. 35).

2. Prendergast v. Snyder.

This was an appeal by petitioner Snyder from an adverse judgment on his cross-complaint for declaratory relief against respondents Prendergast, husband and wife respectively a Negro and a Caucasian [R. Prend., II-1]. Mrs. Prendergast had rented an apartment from defendant in his seven unit dwelling on an oral month-to-month tenancy. Later Mr. Prendergast moved into the apartment, and in December, 1964 (following the adoption of Section 26, Article I) petitioner gave his tenants a 30-day written notice of termination of the tenancy [R. Prend.; II-1, 2]. There is no dispute that this notice complied fully with the nondiscriminatory laws of California relating to tenancies at will.

Prior to the expiration of the tenancy plaintiffs sought an injunction against their eviction, relying upon the Unruh Act and the Fourteenth Amendment. Plaintiffs urged the statute was in full force notwithstanding the adoption of Section 26, Article I; because that provision was invalid under the Fourteenth Amendment [R. Prend., II 34, 35].

By cross-complaint, petitioner sought a declaration that the tenancy had been terminated and that he was entitled to possession. [R. Prend., I-21]. Petitioner as-

serted his rights (1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under the same roof, (2) to acquire, use, enjoy and dispose of his property in any manner he might choose which was not prohibited by statute, ordinance or other legislation, (3) to decline to rent to any particular person or persons or terminate such rental even if his unexpressed reason therefor was the race or religion of the person or persons involved, and (4) to have a court of law recognize and enforce the termination of plaintiffs' tenancy [R. Prend., I-20, 21, II-1, 2].

The trial court found it unnecessary to determine whether Section 26, Article I, was valid under the Fourteenth Amendment [R. Prend., I-34]. Nevertheless, it held that the Fourteenth Amendment barred a state court from granting petitioner any judicial relief, relying upon *Shelley v. Kraemer,* 334 U.S. 1. With two justices dissenting, the Supreme Court of California affirmed upon the ground that Section 26, Article I, violated the Fourteenth Amendment as well as upon the grounds relied upon by the trial court. [R. Prend., II-4, 64 A.C. at p. 593, 50 Cal. Rptr. at p. 905, App. 90].

In the related case of *Hill v. Miller* (App. 91) the Court below affirmed[5] the trial court's judgment for the landlord on demurrer in an action by a Negro tenant to restrain eviction. The Court gave two reasons for reaching a decision in *Hill* contrary to that in *Prendergast:* (1) The single-family residence involved in *Hill,* unlike the property involved in *Prendergast,*

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[5]64 Cal. 2d —, 51 Cal. Rptr 689, after granting a rehearing of its initial decision in which it had reversed the judgment of the trial court, 64 A.C. 598, 50 Cal. Rptr. 908.

had not been covered by the regulatory legislation of 1959 and 1963, and (2) the property owner in *Hill* sought no affirmative relief as had his counterpart in *Prendergast* (App. 94).

Reasons for Granting the Writ.

Taken together, these three decisions of a divided Court below constitute an unprecedented interpretation of the equal protection clause: Although a state is not required by that Clause to take affirmative action to prohibit racial discrimination in private housing, once such statutory prohibitions are adopted, the federal constitution forbids their modification or repeal [R. Mulk., II-19-20].

Moreover, the Court below holds that the Fourteenth Amendment prohibits a state court from recognizing or enforcing the personal, contract or property rights of a private citizen if his motives in acquiring or exercising those rights are those constitutionally forbidden to the state [R. Mulk., II-12-13; Prend., II-4; App. 90]. The stultification of personal liberty consequent upon such a doctrine is manifest: Once challenged in court, all conduct of private persons which the state could constitutionally regulate is to be measured by the stringent standards applied to governmental conduct. The result is to abandon the distinction between private and "state action"; to impose total regulation of private conduct by federal constitutional mandate even if the supreme legislature, the People, deliberately determine non-regulation to be in the public interest.

It is imperative that these holdings be reviewed by this Court for the following reasons:

1. The Decisions Below Constitute an Unprecedented Incursion Into the Legislative Prerogative in the Name of the Equal Protection Clause and Raise Questions of Nationwide Importance.

The decisions below fail to recognize that a legislative choice not to regulate certain conduct is as valid as a choice to regulate.[6] As a result, they pose questions of vital concern not only to the millions of Californians who exercised their democratic prerogative of voting in favor of the questioned state constitutional provision, but also to a whole nation troubled by the current tendency of many to contest their views in the streets rather than in the legislatures or at the ballot box:

Are the states or municipalities already having fair housing regulations forbidden by the Fourteenth Amendment from repealing or modifying them?

Must states considering discretionary civil rights legislation henceforth reckon with the prospect that such legislation, once enacted, is somehow constitutionally immune to modification or repeal in whole or in part?[7]

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[6]See *District of Columbia v. John R. Thompson Co. Inc.*, 346 U.S. 100, 114 where this Court said: "The repeal of laws is as much a legislative function as their enactment;" or to the main dissenting opinion (Mr. Justices Holmes, Brandeis, Pitney and Clark) in *Truax v. Corrigan*, 257 U.S. 312, 348, 349: ". . . just as the states have a broad discretion about establishing police regulations, so they have a discretion, equally broad, about modifying and relaxing them. * * *"

> "* * * And, just as one state might establish such protection by statute, so another state may, by statute, disestablish the protection, even as states have differed in their judicial determination of the general law upon the subject. * * *"

[7]Fifteen states have enacted legislative prohibitions against racial discrimination in certain types of private residential housing.

(This footnote is continued on the next page)

May not many legislators in the 41 states having no fair housing statutes refuse to vote for such already controversial legislation out of the fear that it can never be repealed or modified? Must our highly successful system of legislative trial and error in our several states be abandoned?

Must citizens throughout the nation abandon recourse to legislatures, courts and even the ballot box in seeking modification or repeal of unwanted regulation of wholly private areas of conduct?

Must property owners, business men, and financial institutions henceforth take into account in their dealings with members of minority groups that the generally available remedies to effect collection or repossession may be long delayed or wholly unavailable if the minority-group purchaser, lessee, borrower, or investor, though indebted or wrongfully holding property, alleges he is being sued because he is a Negro, Jew, Communist, Presbyterian, Republican or vocal proponent or opponent of the war in Viet Nam?

Does the Fourteenth Amendment to the federal Constitution grant more extensive rights to Negroes and impose more severe obligations on property owners in

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Three other states have such laws applicable only to publicly assisted housing (App. 15). The Congress is considering Federal legislation (H.R. 14765, 89th Congress, 1st Sess. §401 (1966) and the National Conference on Uniform State Laws is considering the adoption of a uniform act in this field. (L.A. Times, Aug. 5, 1966, §1, p. 11.) But thirty-one states have no such regulations. (App. 15). Interest in the decisions below is indicated by the fact that more than 92 civic, religious, labor, and civil rights organizations appeared as *amici curiae* before the Court below through no less than 74 lawyers. The constitutional issues raised here must be considered by every jurisdiction whether or not it has already enacted "fair housing" laws.

California than in other states? Can the temporary incumbents of a local legislature vary the substance of Fourteenth Amendment rights?

We submit that the decisions below, if allowed to stand, would compel an affirmative answer to each of these questions. The unintended effect would be to inhibit rather than advance the cause of civil rights as well as to disturb the basic distribution of political responsibility and power within the Nation.

Emanating from a widely-respected Court, these decisions are likely to be relied upon throughout the Nation. If so, they may be used to defeat proposed civil rights legislation or to bar any modification or repeal of such laws, however unpopular or ineffective those laws may be.[8]

For all of these practical reasons, we submit that answers from this Court to the important questions here raised are desperately needed by the entire Nation.[9]

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[8]The wisdom and necessity of legislative coercion in the field of discrimination by the owners of private residential property as applied in particular places and times is a question on which there "are rational arguments on either side and, quite clearly, there is room for difference of opinion here among reasonable men who share a common opposition to racial discrimination." Rice, *Bias in Housing: Toward A New Approach,* 6 Santa Clara Lawyer 162, 167-168 (Spring, 1966).

[9]An authoritative resolution of the questions raised by this petition is at least as imperative as the constitutional problem upon which six Justices of this Court expressed their views in *Bell v. Maryland,* 378 U.S. 226, 242, 286, 318. There the problem was whether the Fourteenth Amendment created a self-executing right of access by minority groups to a restaurant open to the public, over the racial objections of its private owner. Here one of the questions is whether there is such a constitutional right of access to privately owned residential property not devoted to public use.

2. The Decisions Below Establish a Concept of "State Action" Under the Fourteenth Amendment Which Is Wholly Unsupported by and in Substantial Conflict With Numerous Decisions of This Court.

The Court below held that California was responsible under the Fourteenth Amendment for the purely private racially discriminatory conduct of Mr. Reitman and Mr. Snyder. Such responsibility was fixed solely because in adopting Section 26 the people of California had "nullified" previously enacted legislation prohibiting such conduct and "forestalled" such legislation in the future except by further vote of the people.[10] (App. 40-41).

Solely by reason of this sequence of legislative activity, according to the Court below, the state "permits", "encourages", "authorizes", and is so "significantly involved in" private discriminatory conduct as to be responsible for it under the Fourteenth Amendment. The Court imported the quoted words from decisions of this Court rendered in cases involving conduct in the performance of inherently public or governmental functions, such as the conduct of primary elections, the exercise of municipal power by a town, or the operation of a municipal park in which there had been no change in "municipal maintenance and concern" and whose "predomi-

[10]The Court below does not suggest that the division of legislative power between the People and the representative legislature, ordained by the California Constitution (Article IV, § 1; App. 9) raises any federal constitutional question. Nor is it suggested there is any federal constitutional prohibition against the particular allocation of power made by Section 26 to the people rather than to the legislature. In *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 41 Cal. Rptr. 9, 13, a unanimous California Supreme Court rejected an argument that a reservation of legislative power by the people rendered a measure unconstitutional.

nant character and purpose" was municipal. To apply such decisions to the private conduct of private citizens in the disposition of their private residential property is to make utter nonsense of many decades of jurisprudence establishing the fundamental distinction between private and "state" action.

Demonstrably, the Court below did not find that Section 26 in fact encourages or authorizes racial discrimination. *Mulkey* could not have been decided on that ground because there the discriminatory conduct occurred long before Section 26 was proposed or adopted [R. Mulk., II-2, 3]. More significantly, had the Court found Section 26 to have actually encouraged or authorized discrimination it could not have decided *Hill v. Miller*, 64 Cal. 2d —, 51 Cal. Rptr. 689, as it did—permitting the landlord to prevail where he expressly relied on what he asserted was the "right" given him by Section 26 to refuse to rent to Negroes (App. 92). Section 26 "encourages" and "authorizes" racial discrimination only in the sense that California no longer prohibits or provides a remedy against such conduct in the narrow field of disposition of residential property by its private owner.[11] The Court held that change of policy,

[11]There is no statute, regulation, rule, municipal ordinance or policy of any governmental unit or officer in California which requires, permits, encourages or sanctions racial discrimination. On the contrary, there are numerous laws in California which encourage and in some instances require the complete elimination of racial discrimination. A summary of those laws is set forth in Appendix, p. 12. They are described in the dissenting opinion of Justice Thomas P. White below (App. 57). In addition, of course, the announcements, both official and unofficial, of our highest State constitutional officers, as well as prominent leaders in the Executive and Legislative Branches of our State Government and the statements of the Statewide chairmen of both the leading political parties, and the pronouncements

(This footnote is continued on the next page)

without more, subjected private discriminatory conduct to the proscriptions of the equal protection clause.[12]

That holding necessarily rests upon a wholly inaccurate equating of the facts of these cases with the subject matter of prior decisions of this Court:[13]

(a) The conduct of the private owners of residential property is equated with the conduct of institutions engaged in providing services to the public on governmentally owned property and with substantial participation of the government, financial and otherwise, such as was involved in *Burton v. Wilmington Parking Authority,* 365 U.S. 715, *Turner v. City of Memphis,* 369 U.S. 350, *Evans v. Newton,* 382 U.S. 296 [R. Mulk., II-15-22, App. 47-54].

(b) The private conduct of petitioners in choosing tenants of their own residential property is equated with the joint conduct of the arresting officer, prosecutor, court, jury, and jailer in Chickasaw, Alabama, the company-owned town author-

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of the California Supreme Court establish that every element of State Government in California strenuously opposes discrimination on the grounds of race, color, creed or national origin. No claim can honestly be made that there is a State-sponsored "mosaic" of discrimination in California. On the contrary, it has a comprehensive official policy against racial discrimination.

[12]As pereviously noted, *supra,* p. 5, in *Prendergast,* the Court also held, relying upon *Shelley v. Kraemer,* 334 U.S. 1, that judicial recognition of the rights here asserted by the property owners against Negro tenants would violate the Fourteenth Amendment even if Section 26 were itself valid. This proposition is discussed under point 3 hereof, *infra,* p. 17 *et seq.*

[13]The conflict of the decisions below with prior decisions of this Court is analyzed in "Editors' Case Note; State Encouraged Discrimination: *Mulkey v. Reitman* (Cal. 1966)," 6 Santa Clara Lawyer 241 (Spring, 1966).

ized by the state to exercise all the governmental powers of a public municipality. *Marsh v. Alabama,* 326 U.S. 501 [R. Mulk., II-15, App. 47].

(c) The private conduct of petitioners is equated with the conduct of the elaborate electoral institutions which in combination with state officials caused all Negroes to be systematically excluded from all participation in the only meaningful elections in certain southern states. *Smith v. Allwright,* 321 U.S. 649; *Terry v. Adams,* 345 U.S. 461; *Nixon v. Condon,* 286 U.S. 73. See also *Anderson v. Martin,* 375 U.S. 399 [R. Mulk., II-14, 15, App. 47-48].

(d) Section 26, Article I of the California Constitution is equated with the statutes in *Robinson v. Florida,* 378 U.S. 153; *Evans v. Newton,* 382 U.S. 296, 15, L. Ed. 2d 373 (as construed in the concurring opinion of Mr. Justice White), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (as construed in the concurring opinion of Mr. Justice Stewart) [R. Mulk., II-16-22, App. 49-54]. The vices of those statutes, respectively, were the imposition of a greater burden upon one who chose not to discriminate in the operation of a restaurant,[14] the legalization of discrimination on grounds of race but on no other grounds in the establishment of public trusts,[15] and the classifica-

[14] *Robinson v. Florida,* 378 U.S. at p. 156. In that case this Court relied upon *Peterson v. Greenville,* 373 U.S. 244, where the city ordinance compelled racial discrimination by private restaurant owners.

[15] *Evans v. Newton,* concurring opinion of Mr. Justice White, 382 U.S. 296, 15 L. Ed. 2d at p. 384.

tion on racial grounds of the right of access to public accommodations.[16]

Section 26 applies to all property owners. It in no way burdens those who do not discriminate. It neither condemns nor authorizes any basis of decision by a property owner with respect to the choice of persons with whom he will deal. It certainly does not single out and favor racial as opposed to other forms of discrimination.

In *Burton,* eight of the justices treated the Delaware statute as reflecting the common law that a private restaurant operator could refuse service to anyone for any reason or for none. That is the plain effect of Section 26: It reestablishes the common law rule that was in effect until 1959 when California adopted the first of its statutes prohibiting racial and religious discrimination in housing.

Notwithstanding the adoption of Section 26, California continues to have more comprehensive legislative prohibitions of discrimination in housing than 41 other states (App. 15-24). The decisions below holding that the people of California are forbidden by the federal Constitution from maintaining or changing such a regulatory plan are plainly wrong.

Their grave portent to the integrity of the legislative process, their threat to the values of federalism, their restriction on the long-standing freedom of Americans to act in private relationships in any way they see fit so long as the action is not prohibited by law enacted

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[16] *Burton v. Wilmington Parking Authority*, concurring opinion of Mr. Justice Stewart, 365 U.S. at p. 726. See *Lewis*, "The Sit-in Cases: Great Expectations", The Supreme Court Review (1963), Univ. of Chi. Press, p. 145, n. 100 [R. Mulk., V-43, 44].

under some constitutional grant of power, and the institutional demands they would impose upon this Court, all urgently point to the necessity that such decisions should not be allowed to stand without review by this Court.

3. The Decisions Below Establish a Drastic, Almost Unique, and Wholly Erroneous Interpretation of *Shelley v. Kraemer*, 334 U.S. 1, Which Urgently Requires Clarification by This Court.

The California Court, relying on *Shelley*, held that a state court would violate the equal protection clause by merely entertaining or ruling on a defendant's plea for declaratory relief with respect to the validity of his private termination of a lease of his private property and of his right to possession of that property, if the termination had been based upon the racial prejudice of the defendant.[17]

The extreme interpretation of *Shelley* by the court below is unsupported by any decision of this Court and has been adopted by the courts of but one other state[18] in the eighteen years since *Shelley* was decided here. It is demonstrably in conflict with the Pennsylvania Supreme Court in the Second Girard Trust Case, in which this Court dismissed the appeal and denied certiorari.[19] It is also irreconcilable with the method

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[17]The superficiality of this analysis of "state action" is apparent from Mr. Justice Harlan's concurring opinion in *Peterson v. Greenville*, 373 U.S. 248 at p. 249. "* * * Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been 'State action of a particular character' (Civil Rights Cases, supra (109 U.S. at 11)—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination."

[18]*State v. Brown* (Del. 1963), 195 A. 2d 379; see also *Abstract Investment Co. v. Hutchinson* (1962), 204 Cal. App. 2d 242, 22 Cal. Rptr. 309.

[19]*In re Girard College Trusteeship* (Penna. 1957), 138 A. 2d 844, appeal dismissed and cert. den. 357 U.S. 570.

of analysis established by this Court in articulating its decisions in the numerous equal protection cases since *Shelley*. Many of these cases, including the sit-in cases of recent years, could have been handled summarily by citation of *Shelley* if it in fact held that judicial recognition of rights whose acquisition or assertion was motivated by racial prejudice would—without more—constitute unconstitutional state action. Instead, this Court has carefully focused on and defined the critical issue: Can the state fairly be charged with the responsibility for the discrimination in acquiring or asserting the right? If not, the discrimination is private. Surely subsequent judicial recognition of the validity of private rights cannot, standing alone, fairly be held to render the state responsible for the discriminatory act or motive out of which they arose. Such a far-reaching interpretation of *Shelley* has been rejected by all but a few of a host of learned commentators.[20]

The restrictive covenant cases are distinguishable from the cases here at issue in important respects. There, the Court was asked to compel discrimination by enjoining or burdening a transaction between willing

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[20]The principal articles are: Lewis, *The Meaning of State Action* (1960), 60 Col. L. Rev. 1083; Lewis, *The Sit-in Cases: Great Expectations*, The Supreme Court Review (1963), University of Chicago Press, particularly at pp. 114-119; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); Van Alstyne and Karst, *State Action*, 14 Stanford L. Rev. 3 (1961) (especially *Case* 17 at p. 50); Kauper, *Civil Liberties and the Constitution*, Chapter IV, pp. 127 166, University of Michigan Press (1962); Pollak, *Racial Discrimination and Judicial Integrity; A Reply to Professor Weschsler*, 108 U. Pa. L. Rev. 1 (1959); St. Antoine, *Color Blindness but not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 Mich. L. Rev. 993 (1961) (especially pp. 1003-1016); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347 (1963).

parties, whereas in the cases below plaintiffs sought to force themselves on unwilling lessors. The Court below wholly ignored this vital distinction. Its holding in this respect directly contradicts the explanations of *Shelley* in the dissenting opinion of Mr. Justice Black for himself and Mr. Justice Harlan and Mr. Justice White in *Bell v. Maryland,* 378 U.S. 226 at p. 331 where it is said:

> *"This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling, as when the property owner chooses NOT to sell to a particular person or NOT to admit that person,* as this Court emphasized in Buchanan, he is entitled to rely on the guarantee of due process of law, that is 'law of the land', to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use." (Emphasis added.)

Judicial action in the restrictive covenant cases forcing willing sellers to discriminate against their will would have had the same characteristics as racial zoning ordinances, given the pervasiveness of such agreements, their duration, their intended applicability to successive non-consenting transferees, and the governmentally imposed sanctions for their breach. The restrictive covenants were held unenforceable for the same reason discriminatory zoning was invalidated, namely, they "an-

nulled the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person." *Buchanan v. Warley,* 245 U.S. 60, 81. That rationale is plainly inapplicable to these cases where unwilling lessors are involved. Clearly, it has no bearing on the questioned provision of the California Constitution. That provision has none of the characteristics of a racial zoning ordinance, none of the features of a court-enforced system of restrictive covenants, and leaves strictly to the private decision of each property owner the choice of his buyer or tenant.

Moreover, as invoked below, *Shelley* would deprive petitioners of access to the courts to recover possession of their property from the wrongful occupation of plaintiffs and deny petitioners their due process and equal protection rights. For in California, an owner of real property with the right to possession can lawfully recover possession from one in actual though wrongful occupation only by an action in unlawful detainer.[21] If petitioners are denied the only remedy the law permits to recover their property, the result is to eliminate without their consent the only provision of the oral month-to-month tenancies they granted which distinguishes them from tenancies for a term. The result would be comparable to a reverse decree of specific performance in favor of the Negro tenants of a contract they did not have, the abrogation of a tenancy-at-will to which the parties had agreed, and the imposition upon landlords of the heavy burden of disproving a racial motive when dealing with Negro tenants.[22] Thereby petitioners

[21]California Code of Civil Procedure, Section 1161, *et seq.*

[22]See *e.g., Rice v. Sioux City Memorial Cemetery* (Iowa), 60 N.W. 2d 110, 115, aff'd 348 U.S. 880, vac. and cert. dis-

would be deprived of their property in a very real and tangible sense without any legislative justification and without due process of law, and would be denied the equal protection of the California unlawful detainer laws.[23]

If the California Supreme Court interpretation of *Shelley* is not reversed, an issue of constitutional proportions and psychiatric overtones may be presented by virtually every dispute between members of different racial, religious or political groups. The inevitable result will be the elimination of stability in a myriad of economic transactions, a shattering of a portion of the law of wills and property,[24] an inestimable increase in the costs of collection on defaulted obligations, a consequent reluctance to deal with members of minority groups, and an enormously expanded responsibility and burden on this Court quite out of keeping with the limited role of both this Court and the Federal Government under the Fourteenth Amendment. In short, the constitutional doctrine below would require this Court on a case by case basis to determine whether private conduct in an infinite variety of contexts should be

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missed, 349 U.S. 70; *Segre v. Ring* (N.H.), 170 A. 2d 265, 266 where the court said regarding an unequivocal restriction against assignment in a lease: "The Court will not rewrite the agreement to compel the [lessor] . . . to permit the assignment or to give their reasons for not doing so." See also, 32 Am. Jur., Landlord and Tenant, § 343.

[23]*Buchanan v. Warley*, 245 U.S. 60; *Bell v. Maryland*, 378 U.S. 226, 318 (dissenting opinion).

[24]Professor Herbert Wechsler in "The Nature of Judicial Reasoning," Part III, C, p. 295 of *Law and Philosophy*, N.Y. Univ. Press, 1964: "* * * But such a proposition is absurd and would destroy the law of wills and a good portion of the law of property, which is concerned precisely with supporting owners' rights to make discriminations that the state would not be free to make on the initiative of officials. * * *"

subjected to the standards imposed upon the states by the Fourteenth Amendment.

As former Solicitor General Archibald Cox argued in the *amicus* brief filed on behalf of the United States in the 1964 sit-in cases:

> ". . . there remains the difficulty that imposing State responsibility upon the basis of jural recognition of a private right turns all manner of private activities into constitutional issues, upon which neither individuals nor the Congress nor the States —but only this Court—could exercise the final judgment."

Expressing a learned concern for the proper institutional role of the Supreme Court, the Solicitor General continued:

> "The preservation of a free and pluralistic society would seem to require substantial freedom for private choice, in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view were questioned, the philosophy of federalism leaves an area for choice to States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts.
>
> "Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keep-

ing with our ideals and institutions to recognize that neither the jural recognition of a private right nor securing the right through police protection and judicial sanction is invariably sufficient involvement to carry State responsibility under the Fourteenth Amendment.

* * *

"We read *Shelley v. Kraemer* as an instance of this moderate view. The more extreme argument may find support in some language in the opinion and has been espoused by a few commentators and two State courts,* but in our view the decision rests more solidly upon narrower grounds. The elements of law involved in the enforcement of restrictive covenants running with the land greatly outweigh any elements of private choice. The sting of restrictive covenants is the power to bind unwilling strangers to the initial transaction. * * *"[25]

**State v. Brown, supra; Abstract Investment Co. v. William O. Hutchinson,* 22 Cal. Rptr. 309 (D.C. App. 2d Dist., 1962).

For all of these reasons we urge this Court to declare that the Constitution does not oblige every court to close its doors to all litigants whose motives are tarnished by their dislike for the race, religion, or political views of their adversaries.

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[25]Supplemental Brief of the United States as *Amicus Curiae* in *Bell v. Maryland,* 378 U.S. 226, and related cases, p. 85, 87, 88-89. Substantially the same view of *Shelley* is set forth in the Government's *Amicus* brief (at pp. 17, 21, 26) in *Evans v. Newton,* 382 U.S. 296, 15 L. Ed. 2d 373.

4. The Decisions Below Conflict Fundamentally With the Broad Legislative Power Sustained by This Court in Such Decisions as *Ferguson v. Skrupa*, 372 U.S. 726, *A. F. of L. v. American Sash and Door*, 335 U.S. 538, and *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483.

Without discussion, the Court below ignored the settled principle that a legislature need not attack all evils in the same field simultaneously. It may elect to proceed one step at a time. It may select those phases of the problem it deems most amenable to regulation and leave other aspects of the same problem unregulated for a time or forever. The Court below itself recognized this principle in *Burks v. Poppy Construction Co.* (Cal. 1962), 20 Cal. Rptr. 609. There the Court sustained the power of the legislature to enact a 1959 statute[26] which prohibited racial discrimination in "publicly assisted" housing but left unregulated the conduct of owners of private housing in choosing their buyers or tenants.

Thus, the same California Court which expressly upheld the legislative power to exclude private housing in 1959 vetoed the exercise of that same power in 1964. This it did in the name of the equal protection clause and notwithstanding the fact that, after the adoption of Section 26, the law relating to private housing was still even more restrictive than it was as a result of the statute involved in *Burks*.

The judicial invalidation of state legislation by the Court below does violence to the principles of a sound federalism and of the proper distribution of govern-

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[26]This was the predecessor to the Rumford Act of 1963 (App. 9-10) which extended the prohibitions of the 1959 law to certain categories of privately owned housing accommodations.

mental power in our constitutional democracy. In this separate respect, the decisions below conflict fundamentally with the principles established by this Court in the cases cited above.

5. The Decisions Below Conflict With Decisions of the Highest Courts in Other States and With Certain Lower Federal Courts.

By invalidating Section 26, Article I of the California Constitution, the Court below has held that the failure of California to provide a remedy which it once provided against racial discrimination by the owners of private residential property violates the equal protection clause. The highest courts of other states and of certain lower federal courts have uniformly held that, to the contrary, the Fourteenth Amendment does not of its own force impose a duty upon the states to provide—or maintain—remedies against the following types of discriminatory private conduct:

1. Refusal of owner to sell or rent private residential property.[27]
2. Discrimination by real estate brokers.[28]

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[27] *Dorsey v. Stuyvesant Town Corporation* (N.Y. 1949), 87 N.E. 2d 541 [not unconstitutional though "Legislature deliberately refrained from imposing any restriction upon a redevelopment company in its choice of tenants."], cert. den. 339 U.S. 981; *Hackley v. Art Builders, Inc.* (D. Md. 1960), 179 F. Supp. 851; *Jones v. Mayer* (E.D. Mo. 1966), — F. Supp. —.

Accord: Traynor, "Law and Social Change in a Democratic Society" (1956) Univ. of Ill. Law Forum, pp. 220, 239 [". . . He has a right to choose his friends, to determine who may come upon his property or to whom he will sell it . . ."]

[28] *McKibbin v. Michigan Corporation & Securities Com'n.* (Mich. 1963), 119 N.W. 2d 557; *Jones v. Mayer* (E.D. Mo. 1966), — F. Supp. —.

3. Religious discrimination by owner of apartment complex housing 35,000 residents.[29]

4. Discriminatory refusal of service in places of public accommodation.[30]

5. Discrimination by employers.[31]

6. Discrimination by owner of cemetery.[32]

7. Discrimination by testators.[33]

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[29]*Watchtower Bible and Tract Society v. Metropolitan Life Ins. Co.* (N.Y. 11948), 79 N.E. 2d 433, cert. den., 335 U.S. 886.

Accord: *Hall v. Virginia* (1948), 335 U.S. 875, summarily dismissing the appeal in 188 Va. 72, 49 S.E. 2d 369 [conviction of trespass affirmed as against contention that statute permitting owner of 60 unit apartment to exclude Minister of Jehovah's Witness' sect from distributing religious tracts in the entrance, elevators, hallways thereof was deprivation of rights of free speech, religious freedom, etc.]

[30]*State v. Brown* (Del. 1963), 195 A. 2d 379 [upholding statute permitting discrimination by innkeepers in derogation of common law]; *Williams v. Howard Johnson's Restaurant* (4th Cir. 1959), 268 F. 2d 845; *Williams v. Hot Shoppes, Inc.* (D.C. Cir. 1961), 293 F. 2d 835; *Williams v. Howard Johnson's Inc. of Washington* (4th Cir. 1963), 323 F. 2d 102, cert. den. 382 U.S. 814, 15 L. Ed. 2d 61, reh. den. 382 U.S. 933, 15 L. Ed. 2d 345 (1965).

In the latter case, the Court of Appeals said: "[T]o accept plaintiff's proposition that the failure of the state to provide a remedy for the redress of complaints of deprivation of the equal protection of the law would be totally to emasculate existing case law. * * *" (at p. 106).

[31]*Black v. Cutter Laboratories* (Cal. 1955); 278 P. 2d 905, cert. den. 351 U.S. 292; *Jones v. American President Lines* (1957), 149 Cal. App. 2d 319; *Cf. Railway Mail Ass'n v. Corsi* (1944), 326 U.S. 88, 98, concurring opinion: "Of course a State may leave abstention from such discriminations [by employers] to the conscience of individuals."

[32]*Rice v Sioux City Memorial Park Cemetery* (Ia. 1953), 60 N.W. 2d 110, aff'd, 348 U.S. 880, vac. and cert. dism., 349 U.S. 70.

[33]*In re Girard College Trusteeship* (Pa., 1958), 138 Atl. 2d 844; appeal dismissed and cert. denied (1958), 357 U.S. 570; *Gordon v. Gordon* (Mass. 1955), 124 N.E. 2d 228; *United States National Bank v. Snodgrass* (Or. 1954), 275 P. 2d 860; *Cf. Pennsylvania v. Board of Directors of City Trusts* (1957), 353 U.S. 230.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM FRENCH SMITH,
Counsel for Petitioners.

SAMUEL O. PRUITT, JR.,
CHARLES S. BATTLES, JR.
Of Counsel.

APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1966
No. .....

NEIL REITMAN *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Appendix to Petition for a Writ of Certiorari to the Supreme Court of California.

STATUTES AND CONSTITUTIONAL PROVISIONS.

Article I, Section 26, California Constitution.

Text.

Sales and Rentals of Residential Real Property

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any sub-

division thereof with respect to the sale, lease or rental of property owned by it.

"Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable. [*New section adopted November 3, 1964*]

Ballot Arguments.

SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. Initiative Constitutional Amendment. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels and similar public places.

Analysis by the Legislative Counsel

This measure would add Section 26 to Article I of the California Constitution. It would prohibit the State and its subdivisions and agencies from directly or indirectly denying, limiting, or abridging the right of any "person" to decline to sell, lease, or rent residential "real property" to such person or persons as he, in his absolute discretion, chooses.

By definitions contained in the measure, "persons" would include individuals, partnerships, corporations and other legal entities, and their agents or representatives, but would not include the State or any of its subdivisions with respect to the sale, lease, or rental of property owned by it. "Real property" would mean any residential realty, regardless of how obtained or financed and regardless of whether such realty consists

of a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

The measure would not apply to the obtaining of property by eminent domain, nor to the renting or providing of any transient lodging accommodations by a hotel, motel, or other similar public place engaged in furnishing lodging to transient guests.

Argument in Favor of Proposition No. 14

Your "Yes" vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.

Most owners of such property in California lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.

The Rumford Act establishes a new principle in our law—that State appointed bureaucrats may force you, over your objections, to deal concerning your own property with the person they choose. This amounts to seizure of private property.

Your "Yes" vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another.

Under the Rumford Act, any person refused by a property owner may charge discrimination. The owner must defend himself, not because he refused, but for his

reason for refusing. He must defend himself for alleged unlawful thoughts.

A politically appointed commission (Fair Employment Practices Commission) becomes investigator, prosecutor, jury and judge. It may "obtain . . . and utilize the services of all governmental departments and agencies" against you. It allows hearsay and opinion evidence.

If you cannot prove yourself innocent, you can be forced to accept your accuser as buyer or tenant or pay him up to $500 "damages."

You may appeal to a court, but the judge only reviews the FEPC record. If you don't abide by the decision, you may be jailed for contempt. You are never allowed a jury trial.

If such legislation is proper, what is to prevent the legislature from passing laws prohibiting property owners from declining to rent or sell for reasons of sex, age, marital status, or lack of financial responsibility?

Your "Yes" vote will prevent such tyranny. It will restore to the home or apartment owner, whatever his skin color, religion, origin, or other characteristic, the right to sell or rent his property as he chooses. It will put this right into the California constitution, where it can be taken away only by consent of the people at the polls.

The amendment does not affect the enforceability of contracts voluntarily entered into. A voluntary agreement not to discriminate will be as enforceable as any other. Contrary to what some say, the amendment does not interfere with the right of the State or Federal government to enforce contracts made with private par-

ties. This would include Federal Urban Renewal projects, College Housing programs, and property owned by the State or acquired by condemnation.

Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.

Your "Yes" vote will end such interference. It will be a vote for freedom.

Submitted by:

L. H. WILSON
Fresno, California
Chairman, Committee
for Home Protection

JACK SCHRADE
State Senator
San Diego County

ROBERT L. SNELL
Oakland, California
President, California
Apartment Owners
Association

Argument Against Proposition No. 14

Leaders of every religious faith urge a "NO" vote on Proposition 14.

Leaders of both the Republican and Democratic parties urge a "NO" vote on Proposition 14.

Business, labor and civic leaders urge a "NO" vote on Proposition 14.

Why such overwhelming opposition? Because Proposition 14 would write hate and bigotry into the Constitution. It could take away your right to buy or rent the home of your chioce.

The evidence is clear:

1. *Proposition 14 is a deception.* It does not give you a chance to vote for or against California's Fair Housing Law. Instead, it would radically change our Constitution by destroying all existing fair housing laws. But more than that, it would forever forbid your elected officials of the state, cities and counties from any future action in this field. It would also threaten all other laws protecting the value of our properties.

2. *Proposition 14 says one thing but means another.* Its real purpose—to deny millions of Californians the right to buy a home—is deliberately hidden in its tricky language. Its wording is so sweeping it could result in persons of any group being denied the right to own property which they could afford.

3. *Proposition 14 is not legally sound.* California's Supreme Court already has said there are "grave" doubts as to its constitutionality. It destroys basic rights of individuals and thus is in violation of the U.S. Constitution.

4. *Proposition 14 is misleading.* California already has a fair and moderate housing law similar to those in effect in 10 other states. In five years the Fair Employment Practice Commission, which administers this law, has dealt with over 3,500 cases in both employment and housing. *All but four cases were either dismissed or settled in the calm give-and-take of conciliation.*

5. *Proposition 14 is a threat.* It would strike a damaging blow to California's economy through loss of $276,000,000 in federal redevelopment and other construction funds. Thousands of Californians could be thrown out of work.

6. *Proposition 14 is immoral.* It would legalize and incite bigotry. At a time when our nation is moving ahead on civil rights, it proposes to convert California into another Mississippi or Alabama and to create an atmosphere for violence and hate.

For generations Californians have fought *for* a tolerant society and *against* the extremist forces of the ultra-right who actively are behind Proposition 14.

Now a selfish, mistaken group would restrict free trade in real estate in California—a powerful lobby seeking special immunity from the law for its own private purposes is asking you to vote hatred and bigotry into our State Constitution.

Do not be deceived. Join the leaders of our churches, our political parties and business and labor in voting "NO" on Proposition 14. Before you vote study! Learn why you should join us!

REVEREND
DR. MYRON C. COLE
President, Council of Churches in Southern California

MOST REVEREND
HUGH A. DONOHOE
Bishop, Catholic Diocese of Stockton

STANLEY MOSK
Attorney General of California

Material Portions of Section 1, Article IV, California Constitution.

LEGISLATIVE DEPARTMENT

Legislative Power Vested in Senate and Assembly.

SECTION 1. The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

California Civil Code Section 51, 52 (California Civil Rights Law, as Amended in 1959 — the Unruh Act).

California Civil Code §51

This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All ~~citizens~~ *persons** within the jurisdiction of this ~~state~~ *State are free and equal, and no matter what their race, color, religion, ancestry or national origin* are entitled to the full and equal accommodations, advantages, facilities, ~~and~~ privileges, of ~~inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bathhouses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable to all citizens.~~ *or services in all business establishments of every kind whatsoever.*

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons* of every color, race, religion, ancestry or national origin.*

*1961 amendment, deleted "citizens".

California Civil Code §52

Whoever denies ~~to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty-one of this code,~~ or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, ~~or~~ race, *religion, ancestry or national origin, contrary to the provisions of Section 51 of this Code,* ~~or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating house, place where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shop, bath house, theater, skating rink, public conveyance, or other public of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction or restriction, for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose,~~ *is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this Code.*

[California Civil Code §§ 51-52 as amended in 1959.]

California Health and Safety Code Section 35,700 et seq. (Material Portions of California "Fair Housing" Law of 1963 — the Rumford Act).

California Health & Safety Code §§ 35700-43—This Act makes it unlawful:

§35720(6) "For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, as defined in this part, and to transactions relating to sales, rentals, leases, or acquisition of housing accommodations, as defined in this part, to discriminate against any person because of race, color, religion, national origin, or ancestry with reference thereto"; and

§35720(7) "For any person, bank, mortgage company or other financial institution to whom application is made for financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of the race, color, religion, national origin or ancestry of such person or persons, or of prospective occupants or tenants, in the terms, conditions or privileges relating to the obtaining or use of any such financial assistance"; and

§35720(8) "For any person to aid, abet, incite, compel or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so."

Other California Antidiscrimination Statutes.

1. Civil Code §69 and Health & Safety Code §10350—Applicants for a marriage license shall not be required to state for any purpose their race.

2. Civil Code §782—Any provision in deed of real property proporting to restrict right to sell, etc. to one race is void.

3. Education Code §8451—No teacher nor entertainments around a school shall reflect in any way upon citizens of the United States because of their race.

4. Education Code §8452—No textbooks, etc. which are adopted shall reflect upon citizens of the United States because of their race.

5. Education Code §13274—Reflects state's policy against persons charged with hiring teachers refusing or failing to do so for reasons of the race of the applicant.

6. Education Code §13732—No questions concerning race shall be asked of any applicant whose name has been certified for appointment for classified positions.

7. Election Code §223—No County Clerk can refuse to deputize any person to register voters because of that person's race.

8. Government Code §19702—No person shall be discriminated against for Civil Service appointment because of race, color, national origin, etc.

9. Government Code §19704—Unlawful to permit any notation to be made on an application or examination for Civil Service indicating the race of any person.

10. Government Code §54091—Any governmental entity which owns, operates or controls beaches shall allow use of them by all persons regardless of color.

11. Government Code §§50260-62—Authorizes counties over 2,000,000 population to establish a commission to develop plans for preserving peace among citizens of all races. Authorizes counties and cities to expend public funds to promote positive human relations.

12. Government Code §8400—Prohibits inclusion of any question relative to an applicant's race to be filled in and submitted by applicant to any board, commission, agents, etc., of this state.

13. Health & Safety Code §33039—State recognizes one of causes of slums is racial discrimination in seeking housing; public policy that this factor will be taken into consideration in any redevelopment program.

14. Health & Safety Code §33050—Policy of State that is undertaking community redevelopment there will be no discrimination because of race.

15. Health & Safety Code §33435—Agencies shall obligate lessees and purchasers of real property acquired in urban renewal to refrain from restricting rental, sales or lease on basis of race. All such deeds or leases shall be submitted to the agency and shall include non-discrimination clauses.

16. Health & Safety Code §33436—Contains the anti-discrimination clauses required to be in the leases, etc.

17. Insurance Code §§11628-29—Insurer cannot refuse to accept application or cancel insurance under conditions less favorable to insured except for reasons

applicable to all races, nor charge one race a higher premium.

18. Labor Code §1735—No discrimination made in employment of persons upon public works because of race; contractor violating this is subject to penalties.

19. Labor Code §1777.6—Unlawful for employer or labor union to refuse to accept otherwise qualified employees as indentured apprentices on any public work solely on basis of race.

20. Labor Code §§1410-32—Fair Employment Practice Act. §1411 states that it is the public policy of this state to protect the rights of all persons to seek employment without discrimination.

The Act applies to employers of five or more persons, labor organizations, employment agencies, and to the State or any of its political subdivisions and cities. The Act does not cover social, fraternal, charitable, educational, or religious associations, non-profit corporations, or employers of agricultural and domestic workers. The Act prohibits an employer to refuse to hire or to discharge from employment any persons because of race, or to discriminate in terms of compensation, etc. on such basis. An employer cannot use an application form or make inquiry of the prospective employee which directly or indirectly expresses a limitation based on race. The bill establishes the Fair Employment Practice Commission to administer the Act.

21. Welfare & Institutions Code §§2380-86—State will not approve local plans to promote community activities among old people unless it is available to all older citizens regardless of race.

Survey of State and Municipal Laws Regulating Racial Discrimination in Housing.

This survey of state and municipal laws relative to "fair housing" is essentially a compilation of information and data published by the Housing and Home Finance Agency of the Federal Government in September of 1964 under the title, *"Fair Housing Laws."* The information contained herein was brought up to date by reference to *Race Relations Law Reporter*. In order to create categories of State fair housing laws, the Housing and Home Finance Agency publication used the following definitions which are also used herein:

PUBLIC HOUSING:

"Housing provided in whole or in part by loans, grants, advances or contributions from a Federal, State, or local governmental body and owned and operated by a governmental instrumentality."

URBAN RENEWAL HOUSING:

"Housing on land purchased from a local public agency pursuant to a plan for the elimination and prevention of slums and blight."

OTHER PUBLICLY ASSISTED HOUSING (FHA, etc.):

"Housing (other than public housing or urban renewal housing) which is constructed or rehabilitated with Government assistance. This includes primarily housing the construction or rehabilitation of which is financed by loans insured or guaranteed by the Federal Housing Administration (FHA), Veterans Administration (VA), or other agency of the Federal, State, or local government. This category also includes housing assisted by means of tax exemption or abatement."

PRIVATE HOUSING:

"Housing provided without Government assistance (such as grants, loans, insurance, or guarantees) and owned by private persons or entities."

In some cases, the statutory language has been quoted herein in order to describe more precisely the coverage of some of the statutes.

STATE LAWS

SUMMARY
(Excluding California)

31 States have no statutes regulating discrimination in housing
18 States have some form of fair housing statute
3 States with such statutes limit their applicability to public, urban renewal or other publicly assisted housing
15 States apply their fair housing statutes in some measure to private housing
13 States which do so provide exemptions for one or more categories
2 States, Michigan and Alaska, do so without any exemptions.

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
Alabama	No	—	—
Alaska	Yes	Is a combined public accommodations and housing statute. All four categories of housing are included: ". . . including but not limited to public housing and all forms of publicly assisted housing, and any housing accommodation offered for sale, rent, or lease."	None
Arizona	No	—	—
Arkansas	No	—	—

California	—	—	—
Colorado	Yes	Applies to all four categories of housing: "'Housing' shall mean any building, structure, vacant land, or part thereof. . . ."	1. Room or rooms offered for sale or lease in a single family dwelling maintained or occupied in part by the owner or lessee as his household. 2. Housing operated by nonprofit fraternal, educational, or social organizations.
Connecticut	Yes	A combined public accommodation and housing statute. All four categories of housing are included. (". . . including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation or building lot, on which it is intended that a housing accommodation will be constructed, offered for sale or rent. . . .")	1. Rental of a unit in an owner-occupied two-family dwelling. 2. Rental of rooms in a house by occupant.
Delaware	No	—	—
Florida	No	—	—
Georgia	No	—	—
Hawaii	No	—	—
Idaho	No	—	—

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
Illinois	Yes	A public housing statute making it "a violation of civil rights" for an official to deny the full and equal enjoyment of the accommodations, privileges, facilities, etc. of his office because of race, religion, color or national ancestry. An urban renewal statute prohibits racial or religious restrictive covenants or provisions.	Not Applicable
Indiana	Yes	Applies to all four categories of housing: ". . . purchase or rental of real property including but not limited to housing." (Prior to 1965, the law covered only public and urban renewal housing.)	Owner-occupant of residential building containing less than four units.
Iowa	No	—	—
Kansas	No	—	—
Kentucky	No	—	—
Louisiana	No	—	—

Maine	Yes	Applies to rental housing in all four categories: ". . . any dwelling, structure or portion thereof offered for rent which is used or occupied or is intended, arranged or designed to be used or occupied as the home, residence or sleeping place of one or more persons. . . ."	1. Rental of one-family unit of an owner-occupied two-family dwelling. 2. Rental of not more than four rooms of a one-family owner-occupied dwelling.
Maryland	No	—	—
Massachusetts	Yes	All four categories of housing are included: "The term 'housing or housing accommodations' includes any building, structure or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings." There is a separate statutory prohibition against discrimination in low rent housing projects.	1. Rental of a unit in an owner-occupied two-family dwelling. 2. Housing operated by religious organizations or by charitable or educational organizations controlled by religious groups.
Michigan	Yes	The Michigan equal accommodations law prohibits discrimination in public housing. The Michigan constitution has been interpreted by the Michigan Attorney General as prohibiting discrimination in all four categories of housing (Mich. Atty.Gen. Op. No. 4161, July 22, 1963.)	None

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
Minnesota	Yes	All four categories of housing are covered by statutes. That portion of the statute relative to private housing refers to "any real property."	1. Rental of a unit in a two-family owner-occupied dwelling. 2. Rental of a room or rooms in an owner-occupied one-family dwelling. 3. Sale or rental of an owner-occupied one-family private dwelling.
Mississippi	No	—	—
Missouri	No	—	—
Montana	Yes	Relates only to urban renewal housing, but no stated penalty for violation and no agency charged with the administration of the prohibition. No legislation relative to public, other publicly assisted or, private housing.	Not Applicable
Nebraska	No	—	—
Nevada	No	—	—
New Hampshire	Yes	The statute in its terms relates to all four categories, but there is no provision covering the sale of housing, and no agency charged with adminis-	1. Rental of a one-family dwelling. 2. All sales of real property.

		tering the law. Violation is punishable by a fine or not less than $10 nor more than $100: ". . . places of public accommodation or in the matter of rental or occupancy of a dwelling in a building containing more than one dwelling."	
New Jersey	Yes	All four categories of housing are included: "All persons shall have the opportunity to obtain employment, to obtain all accommodations, advantages, facilities, and privileges of any place of public accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry or age. . . ."	1. Sale or rental of an owner-occupied one-two-, or three-family dwelling or any portion thereof. 2. Sale or rental of a one- or two-family dwelling or any portion thereof unless it is part of a group of 10 or more houses on contiguous land owned by the same person. 3. Rental of rooms in a one-family dwelling by occupant. 4. Housing operated by religious organizations, or by charitable or educational organizations controlled by religious groups.
New Mexico	No	—	—
New York	Yes	The New York Civil Rights Law has provisions prohibiting discrimination in public housing, urban renewal housing, and other publicly as-	1. Rental of a unit in an owner-occupied two-family dwelling.

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
		sisted housing. In addition, New York's comprehensive "Law Against Discrimination" prohibits discrimination in all housing: ". . . any building, structure, or portion thereof which is used or occupied . . . as the home, residence or sleeping place of one or more human beings."	2. Rental of rooms in a dwelling by the occupant. 3. Housing operated by religious organizations or by charitable or educational organizations controlled by religious groups.
North Carolina	No	—	—
North Dakota	No	—	—
Ohio	Yes	Applies to all four categories of "commercial housing." "'Commercial housing' means housing accommodations held or offered for sale or rent by a real estate broker, salesman or agent, or by any other person persuant to authorization by the owner, by the owner himself, or by legal representatives, but does not include any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employees."	1. Personal residence (see statutory language quoted in coverage column) is defined as an owner-occupied one- or two-family dwelling. 2. Housing operated by a religious or denominational organization.

Oklahoma	No	—	—
Oregon	Yes	Although no particular type of housing is specified, the statute seems to apply to all four categories of housing. The statute prohibits discrimination by persons engaged in the business of selling, leasing, or renting real property.	1. Applies only to persons engaged in the business of selling real property.
Pennsylvania	Yes	Applies to all four categories of housing. The provisions relative to private housing are contained in a comprehensive act designated as the "Pennsylvania Human Relations Act." Public housing, urban renewal housing, and other publicly assisted housing is treated separately in less comprehensive form.	1. Sale or rental of an owner-occupied dwelling or rental of one unit in that dwelling. 2. Housing operated by (a) religious organizations (b) private or fraternal organizations, and (c) charitable or educational organizations controlled by religious groups.
Rhode Island	Yes	Applies to all four categories of housing: "The term 'housing accommodation' includes any building or structure, or portion thereof, or any parcel of land, developed or undeveloped, which is occupied, or is intended to be occupied, or to be developed for occupancy, for residential purposes. . . ."	1. Rental of room or rooms in an owner-occupied dwelling unit. 2. Rental of dwelling unit within an owner-occupied two or three family structure.
South Carolina	No	—	—

State	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions from Coverage of Private Housing Statutes
South Dakota	No	—	—
Tennessee	No	—	—
Texas	No	—	—
Utah	No	—	—
Vermont	No	—	—
Virginia	No	—	—
Washington	No	Washington had a statute relating only to publicly assisted and urban renewal housing which was held unconstitutional by the Washington Supreme Court.	—
West Virginia	No	—	—
Wisconsin	Yes	Applies only to public housing, public housing for veterans and the elderly, and urban renewal housing. Nothing for other publicly assisted or private housing.	Not Applicable
Wyoming	No	—	—

In summary, thirty-one states have no statutes regulating discrimination in housing while eighteen have adopted such statutes (California is not included in this computation). Of the eighteen statutes, three are limited in their application to some form of public, urban renewal, or other publicly assisted housing; the other fifteen apply in some measure to private housing. Of the fifteen remaining statutes which regulate discrimination in private housing, only two, Michigan's and Alaska's have no exemptions; the other thirteen have one or more exemptions.

MUNICIPAL LAWS AND ORDINANCES

The municipal ordinances and laws listed below (including laws of Washington, D.C., the Virgin Islands, and Puerto Rico) include only those which relate to private housing. As in the above compilation of state laws, the following were taken from *Fair Housing Laws*. According to this publication, as of the date of publication, over forty municipalities had enacted ordinances or resolutions declaring a public policy opposed to discrimination in public or urban renewal housing.

A few ordinances enacted since the publication of *Fair Housing Laws* have been included herein, but no representation is made that the additions made include all municipal changes subsequent to that date.

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
Alabama	No	—	—
Alaska	No	—	—
Arizona	No	—	—
Arkansas	No	—	—
California	No	—	—
Colorado	No	—	—
Connecticut			
New Haven	Yes	Dovetails with State Statutes; coverage and exemptions are identical. Establishes a Commission on Equal Opportunities.	
New London	Yes	Dovetails with State Statute; Investigates and reviews complaints of violations of state statute.	
Delaware	No	—	—
Florida	No	—	—
Georgia	No	—	—
Hawaii	No	—	—

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
Idaho	No	—	—
Illinois			
Chicago	Yes	Applies to all four categories of housing: ". . . any housing accommodation."	None—But ordinance applies only to real estate brokers (revocation of license is chief sanction).
E. St. Louis	Yes	Similar to Chicago ordinance except that penalty is $200.00 fine.	
Peoria	Yes	Applies to all four categories of housing: "The term 'housing accommodation' includes any building, structure or portion thereof which is used or occupied, or is maintained, arranged, or designed to be used or occupied, as a home, residence or sleeping place of one or more human beings."	Applies only to real estate brokers. The ordinance specifically provides that owners are not prohibited from imposing restrictions when his property is listed for sale with a broker: "Nothing in this ordinance shall be construed to restrict a property owner from selling or disposing of his property to whomsoever he pleases, or from listing his property with a broker for sale or lease with such restrictions as the owner may choose to impose."
Indiana			
Gary	Yes	Applies to all four categories of housing: "The term 'housing accommodations' means:	1. Any owner-occupied multiple family building designed to accommodate not more than

		(1) Any parcel or parcels of real property . . . available for the building of one or more housing units . . . (2) Any dwelling . . . used or occupied, or intended, arranged or designed to be used or occupied as the home, homesite, residence or sleeping place of one or more human beings. . . ."	three families. 2. Room or rooms within a single apartment. 3. Room or rooms within a single family private dwelling.
Indianapolis	Yes	Recently enacted comprehensive municipal fair housing legislation — details not contained herein.	
Iowa			
Des Moines	Yes	Recently enacted comprehensive municipal fair housing legislation — details not contained herein.	
Iowa City	Yes	Recently enacted comprehensive municipal fair housing legislation — details not contained herein.	
Kansas			
Wichita	Yes	Applies to all four categories of housing: "The term 'housing accommodation' includes any improved or unimproved real property, or portion thereof, which is used or occupied or is intended, arranged or designed to be used as the home, residence or sleeping place of one or more human beings. . . ."	1. Rental of a two-family dwelling. 2. Rental of fewer than four rooms in a one-family, owner-occupied dwelling. 3. Rental of any apartment in a multiple dwelling containing six or fewer apartments.
Kentucky	No	—	—

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
Louisiana	No	—	—
Maine	No	—	—
Maryland	No	—	—
Massachusetts	No	—	—
Michigan			
Ann Arbor	Yes	Applies to all four categories of multiple housing accommodations. Applies to real estate brokers and financial institutions; prohibits discrimination in buildings containing five or more dwelling units, and in buildings or lots comprising a part of five or more dwellings or lots owned by or subject to the control of one person.	1. Does not apply to rental of rooms in a house by owner or lessee-occupant; 2. To an owner or lessee-occupied rooming house; 3. or to an apartment or house retained as the owner's home but leased during his absence.
Grand Rapids	Yes	Prohibits discrimination for all categories of housing in buildings containing three or more dwelling units; prohibits discrimination by one who owns, or controls the sale or lease of, three or more dwellings; prohibits discrimination by financial institutions.	1. The rental, by an owner-occupant residing in a three or more unit building of five or less units within the building; 2. The owner of less than three single family dwellings; 3. Religious or denominational organizations.

Minnesota Duluth	Yes	All urban renewal; other publicly assisted housing; and private housing except as noted.	1. Does not apply to the sale or lease of owner-occupied one-family dwelling; 2. Does not apply to rental of a portion of a two-family owner-occupied dwelling; 3. Does not apply to rental of rooms in an owner-occupied one-family dwelling.
St. Paul	Yes	Recently enacted comprehensive fair housing legislation—details not contained herein.	
Mississippi	No	—	—
Missouri St. Louis	Yes	". . . all housing accommodations." Ordinance applies to "any person" including real estate brokers.	Except the rental of rooms in a single-family residence.
Montana	No	—	—
Nevada	No	—	—
New Hampshire	No	—	—
New Jersey	No	—	—
New Mexico Albuquerque	Yes	All housing	1. Sub-renting or sub-leasing of any portion of apartment or house occupied by a single-family. 2. Housing owned or operated by religious institutions.

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
New York			
New York City	Yes	All housing, except	1. Rental of an apartment in a two-family owner-occupied private dwelling. 2. Rental of rooms within a single family private dwelling. 3. Rental of rooms within an apartment by the tenant-occupant of such apartment. 4. Housing owned or operated by religious or denominational organizations.
Schenectady	Yes	". . . all housing accommodations."	1. Those housing accommodations occupied by the owner and designed to accommodate three families or less. 2. Housing operated by religious institutions.
North Carolina	No	—	—
North Dakota	No	—	—
Ohio			
Oberlin	Yes	Applies to all buildings containing five or more dwelling units, and in buildings or lots if they comprise or are available for the building of five or more dwelling units and are owned by, or subject to the control of one owner.	

Toledo	Yes	All sales of real property and in rentals of a unit in buildings containing five or more units.	
Yellow Springs	Yes	Prohibits discrimination in employment, public accommodations, and all housing, except as noted.	1. The rental of an apartment in a two-family private dwelling by the owner-occupant thereof; 2. The rental of a room or rooms in an owner-occupied single-family private dwelling; 3. The rental of a room or rooms in an apartment by occupant thereof; 4. Housing owned or operated by religious or denominational organizations.
Oklahoma	No	—	—
Oregon	No	—	—
Pennsylvania			
Erie	Yes	Prohibits discrimination in employment, public accommodations, and all housing except as noted.	1. The sale or rental of a one- or two-family owner-occupied dwelling by the owner or his broker; 2. Housing owned or operated by religious or bona fide private or fraternal organizations.
Philadelphia	Yes	Prohibits discrimination in employment, public accommodations, and all housing except as noted.	1. The sale or rental of a one- or two-family owner-occupied dwelling by the owner or his broker;

Municipality, By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
			2. Housing owned or operated by religious or bona fide private or fraternal organizations.
Pittsburgh	Yes	Prohibits discrimination in buildings containing five or more dwelling units, and in buildings or lots if they comprise, or are available for the building of five or more dwelling units and are owned by, or are subject to the control of one owner.	Housing owned or operated by religious and denominational organizations is exempt.
Rhode Island	No	—	—
South Carolina	No	—	—
South Dakota	No	—	—
Tennessee	No	—	—
Texas	No	—	—
Utah	No	—	—
Vermont	No	—	—
Virginia	No	—	—
Washington King County	Yes	Recently enacted comprehensive fair housing legislation; details not set forth herein.	
West Virginia	No	—	—

Wisconsin Beloit	Yes	All four categories of housing are included ● ●	Except for the rental of an apartment house, or portion thereof containing accommodations for not more than three families. This exception does not apply if the apartment house is part of a group of 10 or more houses or dwelling units offered for sale or rental by one person.
Madison	Yes	Prohibits discrimination in employment, public accommodations, and all housing except as noted.	1. The rental of not more than four rooms in an owner-occupied building; and 2. the sale of, or rental of housing in, a building containing four or fewer dwelling units by the owner-occupant thereof.
Wyoming	No	—	—
District of Columbia	Yes	Includes all four categories of housing.	1. Rental of an owner-occupied one- or two-family dwelling. 2. Rental of not more than four rooms in an owner-occupied dwelling. 3. Rental as a unit or room by a religious or fraternal organization.

Municipality; By States	Existence of Laws Relative to Discrimination in Housing	Coverage	Exemptions
Puerto Rico	Yes	Applies to all four categories of housing. ("The term 'dwelling' shall mean any building or part thereof used as a residence or for housing human beings.")	None
Virgin Islands	Yes	Applies to all four categories of housing (". . . to purchase or rent any item of real estate. . . .")	None

OPINIONS AND JUDGMENTS BELOW.

Majority Opinion of the California Supreme Court.

[L.A. No. 28360. In Bank. May 10, 1966.]

Lincoln W. Mulkey et al., Plaintiffs and Appellants, v. Neil Reitman et al., Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Orange County, Raymond Thompson, Judge. Reversed.

Action for general and statutory damages for refusing to rent an apartment to plaintiffs on the ground of race in violation of the Unruh Civil Rights Act. Summary judgment (treated as a judgment on the pleadings) for defendants reversed.

David R. Caldwell, A. L. Wirin, Fred Okrand, Joseph A. Ball and Herman F. Selvin for Plaintiffs and Appellants.

John F. Duff, Richard G. Logan, Cyril A. Coyle, James S. DeMartini, Thomas Arata, William J. Bush, Peter J. Donnici, James T. McDonald, Richard B. Morris, Brundage & Hackler, Charles K. Hackler, Julius Reich, Richard A. Bancroft, Jack Greenberg, Robert M. O'Neil, Duane B. Beeson, Seymour Farber, Robert H. Laws, Jr., Howard Nemerovski, John G. Clancy, Ephraim Margolin, Joseph B. Robison and Sol Rabkin as Amici Curiae on behalf of Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, William French Smith, Samuel O. Pruitt, Jr., Charles S. Battles, Jr., and Richard V. Jackson for Defendants and Respondents.

PEEK, J.—Plaintiffs appeal from a summary judgment entered upon the granting of a motion therefor in

an action for relief under sections 51 and 52 of the Civil Code.[1]

In the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations. The motion for judgment, therefore, properly should be designated as one for judgment on the pleadings and will be so treated on appeal. In any event the allegations of the complaint stand as admitted for our purposes. (See *Davis v. City of Santa Ana,* 108 Cal.App.2d 669, 685 [239 P.2d 656].)

Plaintiffs' complaint sets forth that they are husband and wife, citizens of the United States and residents of the County of Orange, that they are Negroes; that defendants are the owners and managers of a certain apartment building in Orange County; that in May 1963 at least one apartment therein was unoccupied and was being offered by defendants for rent to the general public; that plaintiffs offered to rent any one of available apartments and were willing and able to do so; that defendants refused to rent any of the available apart-

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[1]Civil Code, section 51, provides as follows:

"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Civil Code, section 52, provides as follows:

"Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

ments to plaintiffs solely on the ground that plaintiffs were Negroes; that because of such refusal plaintiffs were unable to rent a suitable place to live; that they suffered humiliation and disappointment and endured mental pain and suffering; that defendants will continue to refuse to rent to plaintiffs and other members of their race solely on the ground of such race unless restrained by order of the court; that plaintiffs have no adequate remedy at law because the discrimination practiced by defendants is also practiced by other real estate brokers, and home and apartment landlords and owners in Orange County.

The motion for judgment was made and granted solely on the ground, as stated by the trial court, "that the passage of Proposition 14 had rendered Civil Code Sections 51 and 52 upon which this action is based null and void." The reference is to the initiative measure which appeared as Proposition 14 upon the statewide ballot in the general election of 1964. Following its approval by the voters it was incorporated into the California Constitution as article I, section 26.

Plaintiffs unsuccessfully opposed the motion on the ground that article I, section 26, is void for constitutional reasons under both the state and federal Constitutions. This contention presents the sole question on appeal.

Proposition 14, as now incorporated into the California Constitution, provides in full as follows:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such

person or persons as he, in his absolute discretion, chooses. .

" 'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

" 'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purpose by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in force and effect. To this end the provisions of this Article are severable." (Cal. Const., art. I, §26.)

For reasons which hereafter appear we do not find it necessary to discuss claims of the unconstitutionality of article I, section 26, based on California constitutional provisions and law. Our resolution of the question of constitutionality is confined solely to federal constitu-

tional considerations. [1] We note preliminarily that although we are examining a provision which, by its enactment by ballot, has been accorded state constitutional stature, the supremacy clause of the United States Constitution nevertheless compels that section 26, like any other state law, conform to federal constitutional standards before it may be enforced against persons who are entitled to protection under that Constitution. (See *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736-737 [84 S.Ct. 1472, 12 L.Ed. 632].)

[2] A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective (*In re Petraeus* (1939) 12 Cal.2d 579, 583 [86 P.2d 343]; see *Griffin v. County School Board,* 377 U.S. 218, 231 [84 S.Ct. 1226, 12 L.Ed.2d 256]), and for its ultimate effect (*Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 880 [31 Cal. Rptr. 606, 382 P.2d 878]); *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 341-343 [81 S.Ct. 125, 5 L.Ed. 2d 110]; *Avery v. Georgia* (1953) 345 U.S. 559, 562 [73 S.Ct. 891, 97 L.Ed. 1244]; *Near v. Minnesota* (1931) 283 U.S. 697, 708-709 [51 S.Ct. 625, 75 L.Ed. 1357]). To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. (*Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645 [335 P.2d 672]; *Evans v. Selma Union High School Dist.* (1924) 193 Cal. 54, 57-58 [222 P. 801, 31 A.L.R. 1121]; see *Snowden v. Hughes* (1944) 321 U.S. 1, 8-9 [64 S.Ct. 397, 88 L. Ed. 497].)

In 1959, the State Legislature took the first major steps toward eliminating racial discrimination in hous-

ing. The Unruh Civil Rights Act (Civ. Code, §§ 51, 52) prohibited discrimination on grounds of "race, color, religion, ancestry, or natural origin" by "business establishments of every kind." On its face, this measure encompassed the activities of real estate brokers and all businesses selling or leasing residential housing. (See *Lee v. O'Hara* (1962) 57 Cal.2d 476 [20 Cal.Rptr. 617, 370 P.2d 231]; *Burks v. Poppy Constr. Co.* (1962) 57 Cal.2d 463 [20 Cal.Rptr. 609, 370 P.2d 313].)

At the same session the Legislature passed the Hawkins Act (formerly Health & Saf. Code, §§ 35700-35741) that prohibited racial discrimination in publicly assisted housing accommodations. In 1961 the Legislature broadened its attempt to discourage segregated housing by enacting proscriptions against discriminatory restrictive covenants affecting real property interests (Civ. Code, § 53) and racially restrictive conditions in deeds of real property (Civ. Code, § 782).

Finally in 1963 the State Legislature superseded the Hawkins Act by passing the Rumford Fair Housing Act. (Health & Saf. Code, §§ 35700-35744.) The Rumford Act provided that "The practice of discrimination because of race, color, religion, natural origin, or ancestry is declared to be against public policy" and prohibited such discrimination in the sale or rental of any private dwelling containing more than four units. The State Fair Employment Practice Commission was empowered to prevent violations.

[3] Proposition 14 was enacted against the foregoing historical background with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right. In short, Propo-

sition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market.

Prior to its enactment the unconstitutionality of Proposition 14 was urged to this court in Lewis v. Jordan, Sac. 7549 (June 3, 1964). In rejecting the petition for mandamus to keep that proposition off the ballot we stated in our minute order "that it would be more appropriate to pass on those questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls. . . ." But we further noted in order that "there are grave questions whether the proposed amendment to the California Constitution is valid under the Fourteenth Amendment to the United State Constitution. . . ." We are now confronted with those questions.

Plaintiffs' basic contention is that the foregoing provision cannot constitutionally withstand the mandate contained in section 1 of the Fourteenth Amendment to the United States Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Thus, the constitutional proscription invoked is twofold. First, it is a limitation on state, as distinguished from private action and, second, it directs that such state action, where undertaken, meet certain minimum standards. If we assume for the moment that the state has undertaken to act in these circumstances, then the pertinent issue becomes whether such action accords equal protection of the laws to plaintiffs. We consider such issue initially.

[4] ~~It is now beyond dispute that the Fourteenth Amendment, through the equal protection clause, secures, "without discrimination on account of color, race~~

[or] religion, 'the right to acquire and possess property of every kind' . . ." (*Buchanan v. Warley* (1917) 245 U.S. 60, 62 [38 S.Ct. 16, 62 L.Ed. 149]; (italics added.) In *Shelley v. Kraemer* 334 U.S. 1, the court expressed itself as follows at page 10 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441]: ". . . among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." (See also *Brown v. Board of Education* (1954) 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180]; *Barrows v. Jackson* (1953) 346 U.S. 249 [73 S.Ct. 1031, 97 L.Ed. 1586]; *Jackson v. Pasadena City School Dist.* (1963) *supra,* 59 Cal. 2d 876; *Sei Fujii v. State of California* (1952) 38 Cal.2d 718 [242 P.2d 617].)

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[5] The question of the fact of discrimination, by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved. Thus, as a complete and only answer to plaintiffs' allegations which irrefutably establish a discriminatory act, defendants urge that section 26 accords them the right as private citizens to so discriminate. [6a] The only real question thus remaining is whether the discrimination results solely from the claimed private action or instead results at least in part from state action which is sufficiently involved to bring the matter within the proscription of the Fourteenth Amendment. For the reasons stated below we have concluded that state action is sufficiently involved to fall within the reach of the constitutional prohibition.

The parties generally concede that in an organized and regulated society the state or its subdivision play some part in most, if not all, so-called private transactions, and it must be acknowledged, without specifically

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*Original language of point [4] was stricken and new language substituted by modification of opinion on denial of rehearing, June 8, 1966.

enumerating them, that many of the rights and duties arising out of the transfer of an interest in real property are related to or dependent upon the state or local governments. But it is not the mere fact that in some manner the state is involved, however remotely, with which we are concerned. [7] It is only where the state is significantly involved that the prohibitions of the equal protection clause are invoked. The Supreme Court in *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, stated the proposition in the following language at page 722 [81 S.Ct. 856, 6 L.Ed. 2d 45]: ". . . private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have been involved in it." That proscribed state involvement is not to be limited to direct conduct on the part of its employees, agents and representatives is made apparent by the court's further statement at page 722: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." More recently the Supreme Court has stated: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." (*Evans v. Newton* (1966) 382 U.S. ..... [86 S.Ct. ....., 15 L.Ed.2d 373].)

[6b] However subtle may be the state conduct which is deemed "significant," it must nevertheless constitute action rather than inaction. The equal protection clause and, in fact, the whole of the Fourteenth Amendment, is prohibitory in nature and we are not prepared to

hold, as has been urged, that it has been or should be construed to impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act. Urged in support of such proposition is *James v. Marinship Corporation,* 25 Cal. 2d 721 [155 P.2d 329, 160 A.L.R. 900]. But the prior state commitment in that case is clear. We held that a so-called private labor union could not racially discriminate against those who wished to become members, but we first concluded that the union, because it had obtained a monopoly on the labor supply, was like a public service business which, under the law of the state, was precluded from discriminating on the basis of race. Likewise, in *Jackson v. Pasadena City School Dist., supra,* 59 Cal.2d 876, the state, because it had undertaken through school districts to provide educational facilities to the youth of the state, was required to do so in a manner which avoided segregation and unreasonable racial imbalance in its schools.

The problem thus becomes one of ascertaining positive state action of a degree sufficient to be deemed significant in the accomplishment of the recognized and admitted discrimination.

To conclude that there is state action in the instant circumstances we are not limited to action by one who, cloaked with the authority of the state, acts as its designated representative. In the broad sense, state action has been consistently found where the state, in any meaningful way, has lent its processes to the achievement of discrimination even though that goal was not within the state's purpose. Thus, state conduct has been found in the action of a trial court in enforcing a privately created restrictive covenant which prevented a

sale of real property to a Negro buyer. (*Shelley v. Kraemer, supra,* 334 U.S. 1.) In that case the court stated at page 14: ". . . [T]he Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.' " In applying the *Shelley* reasoning that the processes of the court cannot be utilized to accomplish a private discrimination, it has been held reversible error to exclude evidence that the plaintiff landlord in an eviction proceeding was motivated purely by racial considerations, although the defendant tenant was admittedly in default. (*Abstract Investment Co. v. Hutchinson,* 204 Cal.App. 2d 242 [22 Cal.Rptr. 309].)

Shelley, and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved. The instant case may be distinguished from the *Shelley* and the *Abstract* cases only in that those who would discriminate here are not *seeking* the aid of the court to that end. Instead they are in court only because they have been summoned there by those against whom they seek to discriminate. The court is not asked to enforce a covenant nor to eject a tenant, but only to render judgment denying the relief sought in accordance with the law of the state. Thus, it is contended by defendants that the isolated act of rendering such a judgment does not significantly involve the state in the prior act of discrimination.

It must be recognized that the application of *Shelley* is not limited to state involvement only through court proceedings. In the broader sense the prohibition extends to any racially discriminatory act accomplished through the significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests. (See *Burton v. Wilmington Parking Authority, supra,* 365 U.S. 715, 722.) Thus, in *Marsh v. Alabama,* 326 U.S. 501 [66 S.Ct. 276, 90 L.Ed. 265], an entire town was owned by a purely private company, the agents of which caused the arrest for trespass of persons engaged in exercising their constitutional freedom of speech. Although no governmental officials or agents were involved, the Supreme Court found sufficient state action to invoke the Fourteenth Amendment. This was based on the view that the company managers were performing a governmental function of managing and controlling a town wherein persons resided who were entitled to Fourteenth Amendment protections: ". . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took plate, where held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . ." (*Marsh v. Alabama, supra,* at p. 509.) There, as contended by defendants in the instant case, the state did not participate except to condone private action.

Even more applicable in the instant circumstances are the so-called "white primary cases." (*Smith v. Allwright,* 321 U.S. 649 [64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110]; *Terry v. Adams,* 345 U.S. 461 [73 S.Ct.

809, 97 L.Ed. 1152]; *Nixon v. Condon,* 286 U.S. 73 [52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458]; *Baskin v. Brown,* 174 F.2d 391; *Rice v. Elmore,* 165 F.2d 387.) In those cases private action infringing the right to vote was held to be the equivalent of state action where accomplished with the culpable permission of the state. In *Nixon v. Condon, supra,* 286 U.S. 73, for instance, a state statute which forbade voting by Negroes in primaries was declared to be unconstitutional. It was thereupon repealed and a substitute measure enacted which was wholly permissive, that is, political parties were allowed to prescribe the qualifications for membership and voting rights in the party's primaries. A local political party thereafter barred Negroes from voting in its primaries and it was held that the permissive private action was chargeable as state action. (See also *Baskin v. Brown, supra,* 174 F.2d 391, 394.)

A similar abdication of a traditional governmental function for the obvious purpose of condoning its performance under color of private action has recently been struck down by the Supreme Court in *Evans v. Newton, supra,* 382 U.S. ..... There, a park for the enjoyment of white persons was owned, managed and maintained by the City of Macon, Georgia, as trustee under the 1911 will of Senator August Bacon. When a question was raised whether the city could continue to maintain the segregated park consistent with the Equal Protection Clause, it purported to transfer the park to private trustees with the intent that it would continue to be maintained for the enjoyment of white persons only. The foregoing conduct on the part of the municipality was held to be proscribed by the Fourteenth Amendment.

It is contended by defendants, however, that the foregoing cases, in the main, involved some recognized governmental function which, although undertaken by private persons, nevertheless was required to be performed in the same nondiscriminatory manner as would be required in the case of performance by the state. Such contention fails to recognize the basic issue involved. Those cases are concerned not so much with the *nature* of the function involved as they are with *who* is responsible for conduct in performance of that function. If the function is traditionally governmental in nature unquestionably the state is responsible. But this cannot be the only instance wherein the state assumes responsibility—it is also responsible when, as we have stated, it becomes significantly involved in *any* discriminatory conduct. (See *Burton v. Wilmington Parking Authority, supra,* 365 U.S. 715, 722.)

Going to the question of what constitutes significant involvement, it is established that even where the state can be charged with only encouraging discriminatory conduct, the color of state action nevertheless attaches. Justice Black, in writing for the majority in *Robinson v. Florida,* 378 U.S. 153, 156 [84 S.Ct. 1693, 12 L.Ed.2d 771], and for the dissenters in *Bell v. Maryland,* 378 U.S. 226, 334 [84 S.Ct. 1814, 12 L.Ed.2d 822]; asserted that private racial discrimination violated the Fourteenth Amendment once the state in any way discourages integration or instigates or encourages segregation. In *Barrows v. Jackson, supra,* 346 U.S. 249, in holding that a racially restrictive covenant could not constitutionally support a suit for damages, the court explained at page 254: "The result of that sanction by the State would be to encourage the use of restrictive

covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages."

Proscribed governmental encouragement of private discrimination has not been confined to the courts. *Anderson v. Martin*, 375 U.S. 399 [84 S.Ct. 454, 11 L.Ed.2d 430], involved racial labeling of candidates on ballots. Although the state practice did not *require* discrimination on the part of individual voters, it was struck down because it *encouraged* and assisted in discrimination. (See also *Baldwin v. Morgan*, 287 F.2d 750.) Similarly, as early as 1914, in *McCabe v. Atchison T. & S.F. Ry.*, 235 U.S. 151, it was stated at page 162 [35 S.Ct. 69, 59 L.Ed. 169] that the denial of equal railroad facilities to Negroes by a private railroad was unconstitutional state action on the ground that the right to discriminate was authorized by a local statute and that should the carrier perpetrate such discrimination it would be acting under "the authority of a state law." The court reasoned that state *authorization* to discriminate was no less state action than state *imposed* discrimination. (See also *Boman v. Birmingham Transit Co.*, 280 F.2d 531.)

The Supreme Court has recently spoken out against state action which only authorizes "private" discrimination. In *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715, the court had before it the question of whether the State of Delaware discriminated

against a Negro who was excluded from a privately-operated restaurant leased from a public agency of that state. The court stated at page 725 that the state "not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity. . . ." In a concurring opinion Justice Stewart, concluding that the state enactment involved, as construed by the state court, *authorized* discrimination, stated at page 727: "I think, therefore, that the appeal was properly taken, and that the statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid." Even the dissenting justices agreed that if the state court had construed the state enactment as authorizing racial discrimination, there was a denial by the state of equal protection of the laws, Justice Frankfurter stating at page 727: "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment."

In a case involving a fact situation similar to *Burton*, and clearly pertinent to our present inquiry, a Tennessee statute renounced the state's common law cause of action for exclusion from hotels and other public places and declared that operators of such establishments were free to exclude persons for any reason whatever. In the particular circumstances of that case the statute was deemed to bear on the issues "only insofar as" it "expressed an affirmative state policy fostering segregation." The court stated that: "our decisions have fore-

closed any possible contention that such a statute . . . may stand consistently with the Fourteenth Amendment." (*Turner v. City of Memphis* (1962) 369 U.S. 350, 353 [82 S.Ct. 805, 7 L.Ed. 2d 762].)

The instant case presents an undeniably analogous situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted. We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions. Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of discrimination itself. Where the state can be said to act, as it does of course, through the laws approved by legislators elected by the popular vote, it must also be held to act through a law adopted directly by the popular vote. When the electorate assumes to exercise the law-making function, then the electorate is as much a state agency as any of its elected officials. It is thus apparent that, while state action may take many forms, the test is not the novelty of the form but rather the ultimate result which is achieved through the aid of state processes. And if discrimination is thus accomplished, the nature of pro-

scribed state action must not be limited by the ingenuity of those who would seek to conceal it by subtleties and claims of neutrality.

Contrary to defendants' claims, the state's abstinence from making the decision to discriminate in a particular instance does not confer upon it the status of neutrality in these circumstances. Justice Byron R. White's view of the facts in *Evans v. Newton, supra*, 382 U.S. ...., poses an almost identical issue to that here presented. In his view the majority in *Evans* were not justified on the record in concluding that the City of Macon was continuing to operate and maintain the park there involved after transfer to private trustees, and he grounded his conclusion of proscribed state action on 1905 legislation which did not compel but would nevertheless make it possible for the maintenance of segregated private parks for either white or colored persons. His reasoning and resolution of the issue are stated at page ..... [15 L.Ed.2d at p. 381] in the following language: "As this legislation does not compel a trust settlor to condition his grant upon use only by a racially designated class, the State cannot be said to have directly coerced private discrimination. Nevertheless, if the validity of the racial condition in Senator Bacon's trust would have been in doubt but for the 1905 statute and if the statute removed such doubt only for racial restrictions, leaving the validity of nonracial restrictions still in question, the absence of coercive language in the legislation would not prevent application of the Fourteenth Amendment. For such a statute would depart from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and would so involve the State in the private choice as to convert the infected

private discrimination into state action subject to the Fourteenth Amendment."

From the foregoing it is apparent that the state is at least a partner in the instant act of discrimination and that its conduct is not beyond the reach of the Fourteenth Amendment.

[8] The question remains whether section 26 in whole or in part must be struck down. It is argued, and with merit, that in many applications no unconstitutional discrimination will result and, as noted, it is specifically provided in the amendment that "If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable." Does such severability clause save the amendment for piecemeal judicial scrutiny as specific instances of its application arise?

We have recognized that a statute which has unconstitutional applications may nevertheless be effective in those instances where the Constitution is not offended. (See *Franklin Life Ins. Co. v. State of California* (1965), [a]63 Cal.2d 222 [45 Cal.Rptr. 869, 404 P.2d 477].) In the *Franklin* case a taxing statute was held to have been properly applied despite the "possibility of hypothesizing an unconstitutional application of the statute" ([b]P. 227.) But in refusing to declare the statute unconstitutional on its face, we stated at [c]pages

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[a]Advance Report Citation: 63 A.C. 221.
[b]Advance Report Citation: 63 A.C. at p. 226.
[c]Advance Report Citation: 63 A.C. at p. 227.

227-228: ". . . [W]hen the application of the statute is invalid in certain situations we cannot enforce it in other situations if such enforcement entails the danger of an uncertain or vague future application of the statute [citations]. We have been particularly aware of fomenting such danger of uncertainty in the application of a statute which would inhibit the exercise of a constitutional right (*In re Blaney, supra*) or impose criminal liability. . . . As the United States Supreme Court has said in rejecting an argument that a statute violative of the Fifth Amendment could be constitutionally applied to the case before it, such a 'course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.' [Citations.]" (See also *Thornhill v. Alabama,* 310 U.S. 88 [60 S.Ct. 736, 84 L.Ed. 1093]; *Carlson v. California,* 310 U.S. 106 [60 S.Ct. 746, 84 L.Ed. 1104]; *Jones v. Opelika,* 319 U.S. 103 [83 S.Ct. 890, 87 L.Ed. 1290].)

The instant case, of course, relates directly to the personal liberties distinguished in *Franklin.* This was also true in the case of *In re Blaney* (1947) 30 Cal.2d 643 [184 P.2d 892], referred to in *Franklin.* In the *Blaney* case the "Hot Cargo Act," which declared secondary boycotts unlawful, was struck down on the ground that in some instances sympathetic strikes and other labor coercion could not be constitutionally restrained, although it was recognized that in other instances the statute could be lawfully applied. The court held that the provisions of the statute did not differentiate between the constitutional and unconstitutional applications, stating that "The only way in which such segregation could be made would be by judicial interpretation, first holding that the act as it stands is wholly unconstitutional, but then determining that, by inserting qualifications

and exceptions in the statutory language, a judicially reformed statute might be given some effect." (*In re Blaney, supra,* 30 Cal.2d 643, 655.) We further held in *Blaney* that a severability clause is ineffective to sustain valid portions or applications of a statute unless ". . . the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words," and that where the statute is not so severable ". . . then the void part taints the remainder and the whole becomes a nullity." (P. 655.)

It is immediately apparent from the operative portion of the instant consitutional amendment that it is mechanically impossible to differentiate between those portions or applications of the amendment which would preserve the right to discriminate on the basis of race, color or creed, as distinguished from a proper basis for discrimination. The purported preservation of the right to discriminate on whatever basis is fully integrated and, under the rule of *Blaney*, not severable. Moreover, while we can conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination where such authorization or right to discriminate does not otherwise exist, any such other purposes clearly "entails the danger of an uncertain or vague future application of the [enactment]" and would thus require that it be struck down. (*Franklin Life Ins. Co. v. State of California* (1965) [d]63 Cal.2d 222, 227 [45 Cal.Rptr. 869, 404 P.2d 477].)

For the foregoing reasons the severability clause is ineffective in the instant case, and the whole of the constitutional amendment must be struck down.

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[d]Advance Report Citation: 63 A.C. 221, 227.

Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the federal Constitution, and is void in its general application.

The judgment is reversed.

Traynor, *C. J.*, Peters, *J.*, Tobriner, *J.*, and Burke, *J.*, concurred.

WHITE, *J.**—I dissent.

In the final analysis as I view it, the primary issue here presented is whether article I, section 26,[1] added to our state Constitution by the people as an initiative measure (Proposition 14) at the general election of November 3, 1964, by a vote of 4,526,460 to 2,395,747, is a valid exercise of state legislative power in choosing not to regulate the private conduct of residential property owners in the sale or rental of their own private property, even if that conduct is discriminatory on racial or religious grounds, or whether such a legislative choice by the people violates the provisions of the Fourteenth Amendment to the Constitution of the United States or federal law.

While the attack in the briefs on the constitutionality of section 26 encompasses some highly emotional and, I feel, inaccurate charges as to its scope, meaning and effect, such as that by its adoption California has taken "affirmative action of a definite and drastic sort . . . [amounting] to condonation or approval of race dis-

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[1]For convenience this section of the Constitution will be referred to as section 26.

crimination in the sale, leasing and rental of housing . . . ."; that it is an "affirmative declaration that the State will never do anything to prevent or eliminate that discrimination"; that it puts "the State in direct opposition to national policy"; and that its effect is "not merely to repeal the Unruh and Rumford Acts but to authorize racial discrimination in the renting of residential property," I am impressed, from a calm and dispassionate reading of section 26, that it is manifest that actually the measure amounts only to a legislative choice by the people acting through the power reserved to them by article IV, section 1, of our California Constitution that a particular method of attempting to solve the problem of housing for minorities, i.e., the imposition of governmental sanctions on *private residential property owners* shall not now be employed; that the state policy which existed in California prior to 1959 shall be restored; and that there be reserved to the people the exclusive legislative power to change or modify this policy.

Prior to the adoption of the Unruh Act, the California Legislature had chosen not to regulate the conduct of property owners in selecting their buyers or tenants whether or not the choice was based on race, color or creed. By the enactment of the Unruh Act in 1959, the Legislature chose to regulate racial and religious discrimination by persons in "business establishments of every kind whatsoever," including persons engaged in the business of selling or renting residential property, brokers and others. (*Burks v. Poppy Constr. Co.*, 57 Cal.2d 463, 468 [20 Cal.Rptr. 609, 370 P.2d 313]; *Lee v. O'Hara*, 57 Cal.2d 476, 478 [20 Cal.Rptr. 617, 370 P. 2d 321].) From September 1963, until section 26 of

article I became effective, by enacting the Rumford Act, the Legislature chose to regulate specifically such discriminating conduct by owners of most but not all residential property. Then, in November 1964, by enacting section 26 of article I of the Constitution, the people exercised their legislative prerogative and declared that the conduct of a private property owner in refusing to sell or rent his property for whatever reason, should not be regulated by the state but should be left to private self-determination, but the legislation regulating persons other than the property owner when dealing with his own property was left in full force. Nor did the adoption of section 26 interfere with or impair the nearly century-old history of legislation affecting race relations in California commencing as it did in 1872 with the enactment of legislation prohibiting innkeepers and common carriers from discriminating in making their facilities available to all races and creeds (now Pen. Code, § 365), legislation which prohibited discrimination in "public accommodations" (Stats. 1893, ch. 185, p. 220). Those provisions which became sections 51-54 of the Civil Code in 1905 and were amended in 1919 and 1923 (Stats. 1919, ch. 210, p. 309; Stats. 1923, ch. 235, p. 485) guaranteed to "All citizens . . . full and equal accommodations . . . of inns, restaurants, hotels, eating houses . . . barber shops, bath houses, theatres, skating rinks, public conveyances, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens." Then in 1925 and succeeding years followed statutory prohibitions against race discrimination in the employment of teachers in California school districts, in civil service, in public works employment,

and assistance programs for needy and distressed persons.

In 1959 the Legislature enacted a measure popularly known as the "Hawkins Act" (Health & Saf. Code, §§ 35700-35741) which prohibited "The practice of discrimination because of race, color, religion, national origin or ancestry in any *publicly assisted housing accommodations*. . . ." (Italics added.) Also adopted at the 1959 legislative session was the California Fair Employment Practice Act (Lab. Code, §§ 1410-1432) prohibiting racial discrimination by certain employers and labor unions, thereby protecting and safeguarding the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, creed, color, national origin or ancestry. None of these guarantees against racial discrimination have been modified or impaired by the challenged constitutional amendment now engaging our attention.

In 1963 the Legislature, in enacting what is commonly known as the "Rumford Act" (Health & Saf. Code, §§ 35700-35744), chose to broaden the policy enunciated in the Hawkins Act, *supra,* with regard to discrimination in housing by extending the provisions of the Unruh and Hawkins Acts to regulate specifically discriminating conduct not only by persons in business establishments of every kind whatsoever, including persons engaged in the business of selling or renting residential property, brokers and others, but regulating such discriminatory conduct by owners of residential property containing more than four units even though not "publicly assisted." It was this latter declared public policy only that was affected by the adoption of section 26.

I am impressed that charges made in the briefs of plaintiffs and amicus curiae that the measure here under consideration was prompted by vicious motives cannot be sustained as against the clear language of the measure itself and the argument that was made to all the voters who cast their ballots at the election.

To discriminate means, insofar as applicable to the instant case, "To make a difference in treatment or favor (of one as compared with others)"; discrimination means ". . . an unfair or injurious distinction." (Webster's New Internat. Dict. (2d ed. 1954).) Contrary to the statutes and laws struck down because of racial discrimination in the cases relied upon by the majority, article I, section 26, now before us, grants equal rights and protection of the law to *any person without regard to race, religion or color,* to sell, lease or rent residential real property to *any person as he chooses.* Where is there discrimination or denial of equal rights to all in this enactment?

But, says the majority opinion, "It is now beyond dispute that the Fourteenth Amendment [Constitution of the United States], through the equal protection clause, secures 'the right to *acquire* and *possess* property of every kind . . . without discrimination on account of color, race [or] religion. . . .' (*Buchanan v. Warley* (1917) 245 U.S. 60, 62-63 [38 S.Ct. 16, 62 L.Ed. 149].) : . . The question of the fact of discrimination by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds

which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."

The answer to that is that section 26 does not sanction or condone racial or religious discrimination. It is rather a declaration of neutrality in a relatively narrow area of human conduct: the exercise of the discretion of a property owner to sell or not to sell or to rent or not to rent his residential property.

Since it is conceded that "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment" (*Civil Rights Cases,* 109 U.S. 3, 11 [3 S. Ct. 18, 27 L.Ed. 835]), it seems to me that any sound analysis of the constitutionality of section 26 must begin with the well established, but frequently ignored premise that the prohibitions of the Fourteenth Amendment are directed at *conduct for which the state is responsible or significantly involved* and do not extend to private conduct however wrongful, discriminatory, unethical or violative or what may be regarded by many as the real philosophy of human relations. In other words, the state must be held *responsible* for denying a citizen the equal protection of the law.

The major constitutional attack on section 26 as contained in the majority opinion would seem to begin with the fallacious assumption of the existence of a federal constitutional right to acquire property without racial discrimination from another citizen and leaps to the conclusion that the failure of the state to enforce that *constitutional right* inevitably involves the state in the constitutionally prohibited discrimination so significantly as to violate the Fourteenth Amendment. Nothing in the federal Constitution gives to one citizen the right to acquire property from another citizen who does

not wish to sell it to him even if the refusal to sell is based on race or religion. A federal constitutional right arises only if the state is responsible for such discriminatory conduct or to some significant extent has been found to have become involved in it.

I am persuaded that in the absence of significant state involvement, the refusal of a property owner to sell or lease his property upon the grounds of race raises no federal constitutional question. As declared by the United States Supreme Court in the leading case of *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 722 [81 S.Ct. 856, 6 L.Ed.2d 45]: "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some *significant extent* the state in any of its manifestations has been found to have become *involved* in it." (Italics added.)

And as was said by Mr. Justice Harlan in his concurring opinion in *Peterson v. Greenville* (1963) 373 U.S. 244, 249-250 [83 S.Ct. 1119, 10 L.Ed.2d 323, 327], "The ultimate substantive question is whether there has been 'State action of a particular character' (*Civil Rights Cases, supra* [109 U.S. at p. 11])—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

"This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. *Freedom of the individual to choose his associates or his neighbors, to use and*

dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. *Also inherent in the concept of State action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.*" (Italics added.)

And since section 26, here in question, involves *residential* property, the views of Mr. Justice Douglas in his concurring opinion in *Lombard v. Louisiana,* 373 U.S. 267 at pp. 274-275 [83 S.Ct. 1122, 10 L.Ed.2d 338, at p. 343] (one of the 1963 sit-in decisions) are cogent:

"If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy. The Fourth Amendment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter a private precinct they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's

home is his castle is basic to our system of jurisprudence."

Plaintiffs urge that the Constitution of California (article I, section 1) declares that among the inalienable rights guaranteed to all persons is the right of ". . . acquiring, possessing and protecting property." But these rights not only include the right to acquire and possess property but also the right to dispose of it freely (*Tennant v. John Tennant Memorial Home,* 167 Cal. 570, 575 [140 P. 242]) and in any way not forbidden by law (*People v. Davenport,* 21 Cal.App.2d 292, 295-296 [69 P.2d 862]). Certainly the constitutional right to own and possess property includes the right to sell to one of the owner's own choice subject only to a valid exercise of the police power for the protection of all the people. Never to my knowledge has article I, section 1, of our state Constitution been construed to give any person the right to acquire property from another who did not wish to sell it to him, however arbitrary his reasons might be. Section 1 of article I, when read with section 26, now means exactly what it meant prior to the adoption of legislation (the Unruh and Rumford Acts, *supra*) conferring a right to acquire property in certain instances without discrimination on grounds of race or religion. It is, therefore, erroneous for plaintiffs to say that the effect of section 26 is to "take from negroes but not from whites, some part of the inalienable rights granted by section 1." Under section 26 all persons of all races and creeds have exactly the same rights they have always had under section 1 in the absence of legislation and, to the extent any rights are restricted by section 26, such restrictions are applicable to *all* persons.

As I view it, the philosophy and rationale of article I, section 26, is epitomized by Mr. Justice Black, long an exponent of an expansive interpretation of the guarantees of the Fourth Amendment, when writing for himself and Justices Harlan and White in the dissent filed in the case of *Bell v. Maryland* (1964) 378 U.S. 226, 330-331 [84 S.Ct. 1814, 12 L.Ed.2d 822, 858] wherein he said: ". . . the line of cases from *Buchanan* through *Shelley* establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to 'inherit, purchase, lease, sell, hold and convey' property, prohibits a State, whether through its Legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. *Shelley v. Kraemer, supra,* 334 U.S. at 19 [9 L.Ed. at 1183, 3 A.L.R.2d 441]. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: 'the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.' (*Buchanan v. Warley, supra,* 245 U.S. at 74 [62 L.Ed. at 161, L.R.A 1918C 1201].) *This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling, as when the property owner chooses NOT to sell to a particular person or NOT to admit that person,* as this Court emphasized in *Buchanan,* he is entitled to rely on the guarantee of due process of

law, that is 'law of the land,' to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use." (Italics added.)

As to the view of the majority that affording a property owner judicial recognition and enforcement of his property rights in the sale or leasing of residential property, on the ground that his motives in selling or leasing were based upon race, color or creed, spells out significant state involvement is not, I submit, supported by statutory or decisional law. This I say because such denial, *in the absence of a valid regulatory statute,* would deprive such an owner of his property without due process of law because a property owner, as heretofore pointed out, has a constitutionally protected right to use and dispose of his property in whatever manner he wishes, not inconsistent with valid legislation. (*Buchanan v. Warley* (1917) 245 U.S. 60 [38 S.Ct. 16, 62 L.Ed. 149]; *Richmond v. Deans* (1930) 281 U.S. 704 [50 S.Ct. 407, 74 L.Ed. 1128].)

In other words, since section 26 does not otherwise offend the Fourteenth Amendment, the mere recognition or enforcement by a court of—for instance—the termination of a month-to-month tenancy in accordance with its terms does not render the state responsible for the motives of the landlord.

In the instant case it is clear that section 26 has effectively repealed inconsistent portions of the Unruh and Rumford Acts, *supra.* Plaintiffs are, therefore, in the position of demanding that the courts refuse to recognize or actually prohibit conduct by defendants which is not now proscribed by any legislation.

When the Legislature adopted the Unruh, Hawkins and Rumford Acts, it was making a choice to impose sanctions upon certain owners of certain types of residential property if they refused to sell or lease it upon grounds of race, color, creed or national origin of the prospective purchasers. Certainly it cannot logically be contended that the Legislature would be barred from repealing those portions of the aforesaid statutes directing sanctions at private property owners in dealing with their own property and substitute therefor another program. If the Legislature has such discretion, then under the Constitution of this state, it cannot fairly be said that the people do not.

I am persuaded that none of the types of state involvement which have been held sufficient to invoke the Fourteenth Amendment in the cases relied upon in the majority opinion can be found in the California amendment here under attack. In fact, the very essence of section 26 is to remove the influence of the state from the formulation of private decisions affecting the sale or rental of privately owned residential property.

Plaintiffs seemingly contend and the majority opinion infers that all conduct which the state has the power to prohibit but which it does not prohibit is conduct for which the state is responsible for Fourteenth Amendment purposes. However, the Supreme Court of the United States has consistently and without exception preserved the fundamental and long recognized principle that the Fourteenth Amendment does not reach private conduct however arbitrary or unenlightened it may be except only where such private conduct involves the performance of a traditional governmental or public function such as the conducting of elections, government

of a town, the furnishing of public services under a monopoly granted by government, private zoning through restrictive covenants or operation of municipal parks. There is no suggestion in the cases now before us that the residential property involved is or ever has been owned, operated, financed or maintained by a governmental entity. Here the property is private residential property owned, operated and maintained by the private persons who were defendants in the court below.

Accordingly, the precise holding of the Supreme Court of the United States in the recent case of *Evans v. Newton* (1966) [a]382 U.S. ..... [86 S.Ct. ....., 15 L.Ed.2d 373], based as it was on the continued municipal operation and maintenance of the property devoted to public use as a park, affords no comfort or support whatever to the attack on section 26. Just as the statute in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 [81 S.Ct. 856, 6 L.Ed.2d 45], could not provide the basis for a violation of the Fourteenth Amendment, so also section 26 does not provide the basis for a judgment that plaintiffs' constitutional rights have been violated.

Admittedly, since government is not an exact science, one of the important factors deserving consideration concerning existing evils and the remedy therefor is prevailing public opinion. This is especially true when such public opinion has been reached after mature deliberation and is both deep-seated and widespread. By an overwhelming margin of popular votes, the people of California have made the same choice on the issue before us as has been made in 32 of our sister states, and our state still has more extensive regulations

[a]Advance Report Citation: 34 U.S.L. Week 4078.

against racial discrimination than exist in 41 states of the union.

To analyze in detail the recent U.S. Supreme Court decision in *Evans v. Newton, supra*, would unduly prolong this already lengthy dissenting opinion. Suffice it to say that it is the most recent of a long line of United States Supreme Court decisions dating from the *Slaughter-House* cases in 1873 and *Civil Rights* cases in 1883 in which that court has steadfastly limited the sphere of the Fourteenth Amendment to conduct of the state or conduct for which the state can fairly be held responsible. In an unbroken line of decisions that court has uniformly reiterated the principle that individual invasion of individual rights is beyond the regulatory ambit of the Fourteenth Amendment.

I do not justify discriminatory private conduct nor approve the state's failure to forbid it, but I submit it is not the province of this court by judicial fiat to enact legislation, a function reserved to the People or the Legislature.

As was stated by Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Douglas, in *Bell v. Maryland, supra* (1964) 378 U.S. 226 at p. 313 [84 S.Ct. 1814, 12 L.Ed.2d 822], arguing for a federal right to equal access to public accommodations which the state may not infringe by judicial action against trespassers: *"Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private as-*

sociation are themselves constitutionally protected liberties." (Italics added.)

Discrimination because of race or religion, political beliefs or other irrational grounds influences the conduct of individuals and society in many ways with as many effects. In virtually all but the *artificially framed racial* test case, such discriminations will, if present, be but one of many motivating factors. This, because we must realize that an innate quality of our very nature is that of selectivity. It manifests itself in our human behavior from the time we attain the use of reason practically until we draw our final breach. If, as conceded by plaintiffs in their briefs and at the oral arguments, and recognized in the majority opinion, we may be selective in choosing our associates in clubs, fraternal organizations, social intimates and business partners because of social or religious prejudice, then by what force of logic or justice should the state be permitted to assert its coercive powers to take from the individual property owner the decision as to who shall be admitted to that property as a resident neighbor or to whom the owner thereof may sell it, save by the law of the land? Yet, this is exactly what the state would be doing in denying to a property owner judicial recognition and enforcement of his private contract and property rights upon the ground that his motives in seeking judicial relief are based upon race, color or creed. By reason of the repeal of certain provisions of the Rumford and Unruh Acts by the enactment of section 26, there is no valid existing regulatory statute depriving an owner of residential property of absolute discretion in the sale or rental thereof. Therefore, since a property owner has a constitutionally protected right to dispose of and use his

property in whatever manner he wishes *not inconsistent with valid legislation,* to deny such owner judicial relief would deny to him the equal protection of the laws in violation of the First, Third, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The majority opinion relies upon the case of *Shelley v. Kraemer,* 334 U.S. 1 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441] as being analogous to the one with which we are here concerned. In *Shelley,* property subject to a racially restrictive convenant had been conveyed by a white owner to a Negro. Owners of a nearby property instituted an action to restrain Shelley, the Negro buyer, from taking possession, and to have title revested in the grantor. This case involved a "willing seller—willing buyer" relationship, and judicial enforcement of the restrictive covenant would have compelled the sellers to discriminate against their wishes. If the *Shelley* case stands for anything, it stands for the philosophy of section 26, by sustaining the freedom of sellers to select whomsoever they choose to buy their property, notwithstanding racial covenants. The key to both *Shelley* and *Barrows v. Jackson,* 346 U.S. 249 [73 S.Ct. 1031, 97 L.Ed. 1586] (affirming *Barrows v. Jackson,* 112 Cal. App.2d 534 [247 P.2d 99]), where the courts refused to recognize a right to damages in neighboring property owners seeking recovery after breach of a racially restrictive covenant by a willing seller to a minority group buyer, is that, were the courts to give recognition to such a cause of action they would not be acting neutrally but actually would be compelling discrimination by a seller who did not wish to discriminate.

Neither case supports the proposition that a state court would have been under a constitutional mandate to compel an owner to sell to a Negro if he preferred to adhere voluntarily to his restrictive agreement. Indeed, the court in *Shelley* expressly concluded "that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment." (334 U.S. at p. 13.) Later it noted that "*these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.*" In short, "but for the active intervention of the state courts, . . . petitioners would have been free to occupy the properties in question without restraint." (334 U.S. at p. 19.) (Italics added.)

Plaintiffs' arguments and the majority opinion based on the *Shelley* case simply do not apply to the cases now before this court where an unwilling seller or lessor is involved. As pointed out in *Shelley,* the court there was asked to enforce an agreement which denied to members of one race rights of acquisition, ownership, occupancy and disposition of property rights that were enjoyed as a matter of course by other citizens of a different race or color. Article I, section 26, of the California Constitution, now before us, applies to property owners without regard to race or color and, accordingly, the conduct condemned in the foregoing cases is not present here.

In support of its holding that a discriminatory act even where the actor is a private citizen motivated by purely personal interests, may fall within the proscrip-

tion of the equal protection clause if state or local government or the purpose of state or local government is significantly involved, the majority opinion herein cites the case of *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 722 [81 S.Ct. 856, 6 L.Ed.2d 45]. This is a leading example of those cases presenting circumstances in which the state has leased state facilities either in whole or in part to a private person or group for carrying on activities or offering services to the public which the government may, but is not obligated to provide.

In *Burton,* the court found significant state involvement in restaurant discrimination because the land and building were publicly owned and had been acquired for "public use." The premises were leased to a private operator but as a part of a publicly owned parking lot where the rental income from the restaurant was necessary for the financial stability of the parking operation.

The *Burton* case and those akin to it simply hold that if a state undertakes to provide or contribute to providing these services, it must obey the strictures of the Fourteenth Amendment, whether the state itself operates the facilities or limits its activities to leasing or financing the facilities operated by private persons but performing the same services.

None of the elements of state involvement present in the *Burton* case—the "white primary" cases where the holding was that the state could not escape the provisions of the Fourteenth Amendment by delegating to a private agency functions which were inherently governmental in character; or the so-called "sit-in" cases involving either municipal ordinances requiring racial dis-

crimination, where the court emphasized that it *was not* confronted with a private policy of discrimination or with mere enforcement by a state court of a state criminal trespass statute, but where the state invoked the statute to promote racial discrimination—is possible under the California constitutional provision here under attack. The very essence of section 26 is to avoid state involvement in private decisions in the sale or rental of privately owned residential property.

Plaintiffs rely on the case of *Abstract Investment Co. v. Hutchinson,* 204 Cal.App.2d 242 [22 Cal.Rptr. 309], cited in the majority opinion. In this case, the District Court of Appeal reversed a judgment for the plaintiff in an unlawful detainer action on the ground that the trial court had erred in refusing to admit evidence in support of certain affirmative defenses which alleged that plaintiff was terminating the tenancy solely because of the Negro defendant's race. As indicated by excerpts on pages 247 through 251 of the *Abstract* case, the court was holding that under the law *as it then existed* racial discrimination was a ground for a court refusing to entertain or sustain a complaint for unlawful detainer because racial discrimination was contrary to the public policy declared inter alia in our state Constitution and in the Unruh and Hawkins Acts adopted by our state Legislature.

The extent of the significance attached by the District Court of Appeal to these state laws is reflected in its extensive discussion at pages 251 through 255 of the opinion concerning the constitutionality and applicability of these statutes.

To the extent that the court in *Abstract* relied upon state antidiscrimination legislation it should not be ap-

plied to cases such as the instant one involving as it does the leasing of residential property because of non-regulation by the state embodied in section 26. Likewise, to the extent *Abstract* was based upon the public policy provisions of the state Constitution, the holding was overruled by the adoption of section 26, here under attack insofar as the sale or leasing of residential property is concerned.

As I view it, another important issue presented to us is whether in the several states a person has a right of action under the Fourteenth Amendment to obtain judicial relief against another person who refuses on grounds of race to deal with him in the sale or leasing of private residential property. If he has such a right of action, then I agree that neither section 26, nor any statute, decision of the court, nor any vote of the electorate can properly deny it.

Also, I certainly agree that conduct based on racial prejudice is injurious, that it is irrational, uncharitable, unenlightened and arbitrary. What I disagree with is the essential foundation of plaintiffs' claim that racial discrimination practiced by private owners of private residential housing is directly forbidden by the Fourteenth Amendment. However delicately or artfully plaintiffs phrase the problem, whether in terms of "state responsibility" for not prohibiting what it has the power to prohibit, or of "abdication of state responsibility" or of "purposefully permitting" "authorizing" or "encouraging" discriminatory conduct, none of these words is so magic as to obscure the plain fact that the only conduct which has injured these plaintiffs is the conduct of private citizens with respect to their own private residential property. I submit the state cannot fairly

be held responsible for that conduct unless it has a duty under the Fourteenth Amendment to prohibit such conduct, and that a state has that duty only if the Fourteenth Amendment contains a self-executing cause of action for racial discrimination in private housing.

No single case relied upon by plaintiffs or cited in the majority opinion holds or even suggests that there is such a cause of action under the Fourteenth Amendment. On the contrary, the authorities are unanimous in holding that no such federal constitutional cause of action now exists, that the Fourteenth Amendment does not extend and that sound reasons forbid its extension to the private conduct here involved.

Furthermore, recourse to the legislative history and debates in the Congress at the time the Fourteenth Amendment was under consideration clearly establishes that the amendment was designed to correct the unjust legislation of some of the states to the end that the law which operates upon one man shall operate equally upon all. This legislative history indicates that the purpose of the amendment was to prohibit *state* legislation such as was adopted in some of the states following the Civil War preventing Negroes from purchasing or leasing land, buying or selling other property or even making contracts precisely as by the federal Constitution, a state is forbidden to pass an "ex post facto law."

The Thirteenth Amendment had just been adopted inhibiting slavery but leaving the freedom of the emancipated people in the power of the states. Hence the necessity of the prohibition to the states. By the very language of the amendment it is manifest that its entire structure rests on the discrimination made by laws of the various states.

In an area concerned solely with the rights and obligations of citizens toward each other, the people have a right either directly or through their elected representatives to regulate that kind of conduct or not to regulate it. The adoption of section 26 of the Constitution of California evidences the decision of the people not to regulate such conduct in the sale or leasing of private residential property and extends such freedom of action to all persons, unrestricted by racial or religious barriers.

I would affirm the judgment.

McCOMB, J.—I concur with the views expressed by Mr. Justice White in his dissenting opinion.

The people of California, under the legislative power reserved to them (Cal. Cons., art. IV, § 1)[1] have, by enacting section 26 of article I, guaranteed to all persons, regardless of race, color or religion, equal rights in their property.

Every person, regardless of his race, color or religion, as an incident of the right to own, possess and enjoy real property, has the right to sell or lease, or to decline to sell or lease, his property to anyone regardless of the race, color or religion of the person with whom he is dealing.

Unless we are to become a socialistic state in which the people have only limited, if any, rights to privately own, possess, enjoy and/or dispose of property, real or

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[1]Article IV, section 1, reads: "The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature."

personal, the proposed decision is obnoxious to our basic form of government.

The people of California, by enacting section 26, article I, of the Constitution, have made it altogether clear that they wish to retain the right to own, possess and enjoy private ownership of property.

By its decision, our court has effectively nullified the will of the people, from whom it derives its power.

I completely disagree with the majority that the subject enactment encourages discriminatory conduct. To me, section 26 is a restatement of a fundamental principle that all property owners have a right to enjoy or to dispose of their property in any lawful manner, in their absolute discretion.

Memorandum Opinion of the Superior Court of Los Angeles County.

Superior Court of the State of California, for the County of Los Angeles.

Wilfred J. Prendergast and Carola Eva Prendergast Plaintiffs vs. Clarence Snyder, Defendant. No. 851387.

Filed March 15, 1965.

MEMORANDUM OF DECISION

Plaintiffs, who are husband and wife, occupy an apartment under a month-to-month tenancy in a seven unit apartment building owned by defendant. Their tenancy commenced August 1, 1964, and on December 1, 1964, they were served with a 30 day notice pursuant to Section 1946 of the Civil Code requiring them to quit and deliver up possession of the premises to defendant. The sole reason for defendant's decision to terminate the tenancy was that plaintiff husband is a Negro.

This action was brought by plaintiffs to enjoin defendant landlord from evicting them because of race.

Defendant has cross-complained for declaratory relief. He seeks a judicial declaration that plaintiffs' tenancy and right of occupancy has been lawfully terminated even if racial discrimination was the reason therefor, that defendant is entitled to immediate possession of the premises, and that he is entitled to have a court recognize and enforce termination of plaintiffs' tenancy and restoration of the premises to him even if he is motivated solely by racial prejudice.

Defendant made a motion for a summary judgment dismissing plaintiffs' action and granting him the relief requested in his cross-complaint. Affidavits have been filed indicating that another tenant has vacated her apartment and others will do so if plaintiffs remain because those tenants do not want to live in a building occupied by a Negro, and projecting an economic loss to defendant if plaintiffs do not vacate the premises.[1] Defendant's motion for summary judgment, together with plaintiff's application for a preliminary injunction, has been submitted for decision.

In opposition to defendant's motion and in support of their own, plaintiffs rely on the Unruh Civil Rights Act which, among other things, prohibits racial discrimination in the rental of real property in certain circumstances.[2] Defendant, in turn, relies upon Section 26,

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[1]The cross-complaint similarly alleges that although defendant intended to live in the building in the future, he does not want to do so if a Negro continues in occupancy.

[2]Civil Code, Sec. 51, provides: "All persons . . . are free and equal, and no matter what their race, color, . . . are entitled to the full and equal accommodations . . . in all business establishments of every kind whatsoever." Section 52 states that "whoever denies . . . or makes any discrimination . . . on account of color, race . . . contrary to the provisions of Section 51 . . . is liable . . . for damages.

(This footnote is continued on the next page)

Article I, of the California Constitution,[3] which if valid, admittedly repeals the Unruh Act insofar as the latter imposes sanctions on the owners of real property who discriminate on the basis of race or color in the rental thereof.[4] Defendant contends that there is now no statutory or common law cause of action in California against a property owner for his refusal to rent or to permit continued occupancy of his property, whatever his motives, and, accordingly, that there is no legal impediment to his evicting plaintiffs on grounds of race. Plaintiffs counter with the contention that Section 26 of Article I is invalid by reason of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[5] They further contend that judicial enforcement of defendant's decision to terminate plaintiffs' tenancy on racial grounds would deny plaintiffs rights guaranteed them by the Equal Protection Clause. Inasmuch as the latter contention has merit, it is unnecessary to consider the former.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits

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Swann v. Burkett, 209 Cal. App. 2d 685, holds that an apartment building such as that involved herein is a "business establishment" within Section 51.

[3]"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly the right of any person, who is willing or desirous to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

Section 26, Article I, was known as Proposition 14 on the ballot at the last General Election.

[4]Other anti-discriminatory housing legislation, such as the Rumford Act (Health & Safety Code, Secs. 35700-35744), would also be repealed.

[5]"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

racial discrimination by the state, but it does not prohibit such offensive conduct by a private individual "unless to some significant extent the State in any of its manifestations has been found to have become involved in it." (Burton v. Wilmington Parking Authority, 365 U.S. 715; Peterson v. Greenville, 373 U.S. 244; Shelley v. Kraemer, 334 U.S. 1; Civil Rights Cases, 109 U.S. 3.) It has been held that the prohibited involvement occurs when a state court enforces the racial discriminatory act of a private individual relating to occupancy of residential real property in cases where affirmative relief is sought in aid or furtherance of the discrimination. (Shelley v. Kraemer, supra; Barrows v. Jackson, 346 U.S. 249; Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242; *cf* In re Laws, 31 Cal. 2d 846; Clifton v. Puente, 218 S.W. 2d 272 (Texas); State v. Brown, 195 A. 2d 379 (Dela.).) *Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242, specifically holds that judicial enforcement of the eviction of a tenant on racial grounds is prohibited by the Equal Protection Clause. There, a landlord commenced an unlawful detainer action to recover possession of premises leased to and occupied by a Negro under a month-to-month tenancy. The tenant's attempt to set up the defense that he was being evicted because of race was denied by the trial court. The District Court of Appeal reversed, holding that the tenant should have been permitted to show racial discrimination by his landlord "which if proven would bar the court from ordering his eviction because such 'state action' would be violative of" the federal Constitution. (Supra, p. 255).

It would seem that the decision in the *Abstract* case is determinative of the present case. However, defend-

ant contends that case is not controlling because, he claims, it represents an erroneous interpretation or misapplication of decisions of the United States Supreme Court in the restrictive covenant cases, principally *Shelley v. Kraemer*, 334 U.S.1, and *Barrows v. Jackson*, 346 U.S. 249. Those cases held that the Equal Protection Clause interdicts judicial enforcement by state courts of restrictive covenants directed against use or occupancy of real property by non-Caucasians. The *Shelley* case involved an action in equity to enforce such a covenant by enjoining a Negro purchaser from occupying the purchased property. The *Barrows* case involved an action for damages against a white vendor for breach of covenant in calling to a Negro. Defendant argues that since the Shelley and sellers to discriminate against their wishes, and that the Supreme Court decisions in those cases must, therefore, be limited to situations where the 'state action' coerces the private decision to discriminate. The facts and language in Shelley and Barrows, as well as in subsequent cases, would appear to challenge the limitation contended for by defendant.[6] Although state action which coerces discrimination by private individ-

[6]The private decisions to disciminate which were sought to be enforced in Shelley and Barrows long antedated the 'state action'. In *Shelley v. Kraemer*, the Court stated: "Here the particular patterns of discrimination and the areas in which restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. * * * These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. * * * Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement." The opinion in *Barrows v. Jackson*, 112 Cal. App. 2d 534, summarized Shelley v. Kraemer as follows: "The thrust of the decision is aimed at prohibition of judicial participation in the maintenance of racial residential segregation."

uals is unquestionably prohibited, it appears that state participation in or active support of a private policy of racial discrimination, which participation or support does not have the effect of coercing the private decision to discriminate, is equally prohibited. (Burton v. Wilmington Parking Authority, 365 U.S. 715; Penn. v. Board of Trusts, 353 U.S. 230; Griffin v. Maryland, 378 U.S. 130; *cf.* Marsh v. Alabama, 326 U.S. 501; Cooper v. Aaron, 358 U.S. 1; Simkins v. Mose H. Cone Memorial Hospital, 323 F. 2d 959; Jackson v. Pasadena School District, 59 Cal. 2d 876.)[7]

But regardless of whether or not the decision of the District Court of Appeal in *Abstract Investment Co. v. Hutchinson,* supra, is sound, this court is required to follow it in the absence of contrary decisions by state appellate courts of equal or greater authority or by the United States Supreme Court. No such state court decisions have been cited.[8] A number of recent decisions of the United States Supreme Court arising out of the "sit-in" demonstrations have been cited by defendant in support of his contention that judicial enforcement by state courts of private racial discrimination does not of itself constitute prohibited state action. The fact is that

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[7]In *Griffin v. Maryland*, supra, it was said: "The Board of Trust case must be taken to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment."

[8]*Housing Authority v. Cordova,* 130 Cal.App. 2d 883, which states by way of dictum that a landlord may refuse "to permit the continued occupancy of his premises by persons of a particular race," is an opinion of the Appellate Department of the Los Angeles Superior Court, and, does not discuss the constitutional question. *Hill v. Miller,* which holds that judicial enforcement of a tenant's eviction on grounds of race does not violate the Fourteenth Amendment, is an opinion of the Sacramento Superior Court, and, makes no reference, in this connection, to the *Abstract* case.

none of those decisions so hold. The cases relied upon are *Peterson v. Greenville,* 373 U.S. 244, *Lombard v. Louisiana,* 373 U.S. 267, *Griffin v. Maryland,* 378 U.S. 130, and *Robinson v. Florida,* 378 U.S. 158, each of which reversed state criminal trespass convictions of persons who were denied service in or equal access to places of public accommodation and who refused to leave the private premises when requested. Although the state action condemned in each of those cases was legislative, executive or administrative,[9] no approval of the judicial activity was indicated. The Supreme Court has expressly abstained from determining "whether the Fourteenth Amendment . . . operates of its own force to bar criminal trespass convictions where . . . they are used to enforce a pattern of racial discrimination" in places of public accommodation.[10]

Defendant's attempt to distinguish the *Abstract* case on the basis that it "could have been decided" on the

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[9]In *Peterson v. Greenville,* supra, prohibited state involvement was found in the existence of a city ordinance which required segregation in eating places. In *Lombard v. Louisiana,* supra, public statements by city officials that attempts to secure desegregated service were not in the public interest and would not be permitted constituted the offending state action. In *Griffin v. Maryland,* supra, state participation or involvement resulted from enforcement of a private amusement park's policy of discrimination by an employee of the park who was also a deputy sheriff. In *Robinson v. Florida,* supra, regulations of the board of health requiring separate restroom facilities where white and colored persons were accommodated were held to have involved the state in the private discrimination.

[10]Hamm v. Rockhill, ... U.S. ...., 13 L. Ed 2d 300. See also Robinson v. Florida, 378 U.S. 158; Garner v. Louisiana, 368 U.S. 157; Bell v. Maryland, 378 U.S. 226. But see State v. Brown, 195 Atl. 2d 379 (Dela)

It is true that three members of the Supreme Court, Justices Harlan, Black and White, are of the opinion that such convictions are permissible. See dissenting opinion of Justice Black in Bell v. Maryland, supra. But three other members, Chief Justice Warren, Justices Douglas and Goldberg, are of the contrary opinion. See concurring opinions of Justice Douglas and Justice Goldberg in Bell v. Maryland, supra.

ground that the conduct of the landlord therein was in violation of the Unruh Act must also fail. The opinion of the District Court of Appeal in that case expressly stated that it could not find "that the discrimination complained of constituted a violation of the Unruh Act." (204 Cal. App. 2d 242, 255)

Finally, defendant contends that to refuse judicial enforcement of a landlord's decision to terminate a tenancy because he is motivated by racial discrimination, would deny him due process and equal protection of the laws. A similar contention was rejected in *Shelley v. Kraemer* with the remark that "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." (Supra at p. 22; See also Barrows v. Jackson, supra; Abstract Investment Co. v. Hutchinson, supra at p. 251)

Abstract Investment Co. v. Hutchinson, supra, requires a holding that when a property owner who devotes his property to the business of rental for occupancy by others affirmatively attempts to invoke the coercive power of a court to effectuate or secure his private racial discriminatory purpose in seeking to oust the occupant, the Equal Protection Clause prohibits the court from assisting him in enforcing his private policy of racial discrimination and precludes judicial enforcement of the attempted eviction. It follows that if Section 26, Article I, on the California Constitution could be construed as requiring a court at the request of a landlord to enforce his decision to evict a tenant because of race and recover possession of the premises, it could not be given effect. It is unnecessary, in this case, however, to determine the question of the validity of Sec-

tion 26, of Article I, in any other application or circumstances not presented by this case.

Defendant's motion for summary judgment is denied. Since there is no suggestion that defendant intends, at the present time, to seek judicial enforcement of his discriminatory purpose, other than by his request for declaratory relief herein, there appears to be no occasion to grant plaintiffs' application for a prelimiary injunction, and the application is therefore denied.

Majority Opinion of the California Supreme Court.

[L.A. No. 28422. In Bank. May 10, 1966.]

Wilfred J. Prendergast et al., Plaintiffs, Cross-defendants and Respondents, v. Clarence Snyder, Cross-complainant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Katz, Judge. Affirmed.

Action to enjoin defendant from evicting plaintiffs from rented premises by reason of plaintiff husband's race and cross-action seeking a declaration that termination of the tenancy was not invalid. Judgment for plaintiffs entered on defendant's motion for summary judgment on the cross-complaint, affirmed.

Gibson, Dunn & Crutcher, William French Smith, Samuel O. Pruitt, Jr., Charles S. Battles, Jr., for Defendant, Cross-complainant and Appellant.

A. L. Wirin and Fred Okrand for Plaintiffs, Cross-defendants and Respondents.

John F. Duff, Richard G. Logan, Cyril A. Coyle, James S. DeMartini, Thomas Arata, William J. Bush, Peter J. Donnici, James T. McDonald, Richard B. Morris, Richard A. Bancroft, Jack Greenberg, Robert

M. O'Neil, Joseph B. Robison, Sol Rabkin, Duane B. Beeson, Seymour Farber, Robert H. Laws, Jr., Howard Nemerovski, John G. Clancy and Ephraim Margolin as Amici Curiae on behalf of Plaintiffs, Cross-defendants and Respondents.

PEEK, *J.*—Defendant landlord appeals from a judgment for plaintiff tenants entered upon defendant's motion for summary judgment on his cross-complaint for declaratory relief.

Plaintiffs Prendergast are husband and wife, respectively a Negro and a Caucasian. Prior to their marriage Mrs. Prendergast rented from defendant an apartment in his seven-unit dwelling on an oral, month-to-month tenancy. Mr. Prendergast moved into the apartment with his wife following their marriage, and defendant thereupon purported to terminate plaintiffs' tenancy in the exercise of his claimed right "(1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under the same roof, and (2) to acquire, use, enjoy and dispose of his property in any manner he may choose which is not prohibited by statute, ordinance or other legislation."

The instant action was commenced by plaintiffs to enjoin defendant from evicting them by reason of plaintiff husband's race. In his cross-complaint defendant sought a declaration that his termination of the tenancy was not invalid, that defendant is entitled to possession of the premises, that his refusal to rent to any particular person or persons or terminate such rental would not be unlawful even if his unexpressed reason therefor was the race or religion of the person or persons involved, and that defendant has a right to

have a court of law recognize and enforce the termination of plaintiff's tenancy. Defendant relies upon article I, section 26 of the Constitution, which provides in pertinent part: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The trial court, in a memorandum opinion, held that the Fourteenth Amendment, through the equal protection clause, proscribed discrimination based on race where directly practiced by a state and also if practiced by private persons where "to some significant extent the State in any of its manifestations has been found to have become involved in it," citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 [81 S.Ct. 856, 6 L.Ed.2d 45], and *Shelley v. Kraemer*, 334 U.S. 1 [68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441]. The court then noted that "the prohibited involvement occurs when a state court enforces the racial discriminatory act of a private individual relating to occupancy of residential real property in cases where affirmative relief is sought in aid or furtherance of the discrimination. (*Shelley v. Kraemer, supra; Barrows v. Jackson*, 346 U.S. 249 [73 S.Ct. 1031, 97 L.Ed. 1586]; *Abstract Investment Co. v. Hutchinson*, 204 Cal.App.2d 242 [22 Cal.Rptr. 309].)"

In the *Abstract Investment Co.* case a landlord commenced an unlawful detainer action to recover possession of premises leased to and occupied by a Negro under a month-to-month tenancy. A judgment for plain-

tiff was reversed on the ground that it was prejudicial error to deny defendant an opportunity to show that he was being evicted solely because of his race. The court held in that case that if defendant could have proved racial discrimination it "would bar the court from ordering his eviction because such 'state action' would be violative of" the federal Constitution. (*Abstract Investment Co. v. Hutchinson, supra,* 204 Cal.App.2d 242, 255.)

The trial court in the present case concluded that it was bound by the *Abstract Investment Co.* case and, further, that if article I, section 26, which was adopted following the decision in that case, could be construed as requiring a court to enforce a landlord's decision to evict a tenant because of race, it could not be given that effect for federal constitutional reasons.

Although it appears that the instant case is factually indistinguishable from the *Abstract Investment Co.* case, we are not required to rely upon that case in affirming the judgment herein. We have held today that article I, section 26, upon which defendant relies for the declaration of his rights, is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment. (*Mulkey v. Reitman,* [a]*ante,* p. ..... [..... Cal. Rptr. ....., ... P.2d .....].) For that reason, as well as those relied upon by the trial court, defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed.

Traynor, *C.J.*, Peters, *J.*, Tobriner, *J.*, and Burke, *J.*, concurred.

WHITE, *J.**—I dissent.

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[a]Advance Report Citation: *Ante,* p. 557.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

For the reasons stated in my dissent in *Mulkey v. Reitman,* [b]*ante,* p. ....., [..... Cal.Rptr. ....., ... P.2d ....], I would reverse the judgment.

McComb, *J.*, concurred.

Majority Opinion of the California Supreme Court.

[Sac. No. 7675. In Bank. June 8, 1966.]

Clifton Hill, Plaintiff and Appellant, v. Crawford Miller, Defendant and Respondent.

[On rehearing after judgment reversed (64 A.C. 598, 50 Cal.Rptr. 908). Judgment of superior court affirmed.]

APPEAL from a judgment of the Superior Court of Sacramento County. William M. Gallagher, Judge. Affirmed.

Action to restrain a landlord from evicting a Negro tenant solely because of his race. Judgment of dismissal after demurrer was sustained without leave to amend affirmed.

Colley & McGhee, Nathaniel S. Colley, Milton L. McGhee, Stanley Malone and Clarence B. Canson for Plaintiff and Appellant.

John F. Duff, Richard G. Logan, Cyril A. Coyle, James S. DeMartini, Thomas Arata, William J. Bush, Peter J. Donnici, James T. McDonald, Richard B. Morris, Richard A. Bancroft, Jack Greenberg, Joseph B. Robison, Sol Rabkin, Robert M. O'Neil, Duane B. Beeson, Seymour Farber, Robert H. Laws, Jr., Howard Nemerovski, John G. Clancy, Ephraim Margolin, George T. Altman and Ray R. McCombs as Amici Curiae on behalf of Plaintiff and Appellant.

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[b]Advance Report Citation: *Ante,* p. 557.

Harry A. Ackley, Robert J. Cook and John M. Beede for Defendant and Respondent.

Gibson, Dunn & Crutcher, William French Smith, Samuel O. Pruitt, Jr., and Charles S. Battles, Jr., as Amici Curiae on behalf of Defendant and Respondent.

PEEK, *J.*—Plaintiff tenant appeals from a judgment for defendant landlord entered upon the sustaining of a demurrer without leave to amend in an action for an injunction to restrain defendant from evicting plaintiff, a Negro, solely because of his race.

[1] It appears from the complaint and is deemed admitted by the demurrer that plaintiff occupies, as a tenant, residential property owned by defendant; that defendant caused to be served upon plaintiff a notice to quit possession and terminate the tenancy; that the notice was given only for the reason that defendant plans to exclude Negroes from the rental of residential real property owned by defendant; that defendant intends to follow the notice with an action for unlawful detainer in the appropriate municipal court; that he asserts he is entitled to discriminate in the rental of his property in reliance on article I, section 26, of the California Constitution;[1] that plaintiff has a right not to be subjected to such discrimination by virtue of the Fourteenth Amendment to the federal Constitution, and that he has no adequate remedy at law by which to preserve his right.

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[1]The operative portion of article I, section 26, of the California Constitution provides:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

Defendant demurred to the complaint upon the ground that it failed to state sufficient facts to constitute a cause of action. Arguments on the demurrer were heard together with arguments on plaintiff's motion for a preliminary injunction and the merits of the constitutionality of article I, section 26. The demurrer was sustained without leave to amend, and thereafter the instant judgment was entered.

We have concluded in *Mulkey v. Reitman,* [a]*ante,* p. .... [50 Cal.Rptr. 881, ... P.2d ....], that article I, section 26, is an unconstitutional infringement upon the equal protection clause of the Fourteenth Amendment, and for that reason defendant is not entitled to rely upon it as giving him a right to discriminate against plaintiff in the rental of defendant's property. It does not follow from such holding, however, that plaintiff stated a cause of action. To withstand defendant's demurrer he must allege facts which entitle him to relief as a matter of law. This he has failed to do.

The facts which plaintiff has alleged show only that defendant has discriminated and intends to further discriminate against defendant and Negroes generally in the rental of defendant's residential property. The Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit a private discrimination of the nature alleged here. (*Mulkey v. Reitman,* [b]*ante,* pp. ...., ... [50 Cal.Rptr. 881, ... P.2d ....].)

[2] Although the state, by action of the Legislature or the People, may make such private acts of discrim-

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[a]Advance Report Citation: *Ante,* p. 557.

[b]Advance Report Citation: *Ante,* pp. 557, 564.

ination unlawful, it has not done so. [3] Section 51 of the Civil Code, commonly known as the Unruh Civil Rights Act, prohibits discrimination only where it occurs in "business establishments of every kind whatsoever." (See *Lee v. O'Hara* (1962) 57 Cal.2d 476 [20 Cal.Rptr. 617, 370 P.2d 321]; *Burks v. Poppy Constr. Co.* (1962) 57 Cal.2d 463 [20 Cal.Rptr. 609, 370 P.2d 313].) [4] The Rumford Fair Housing Act (Health & Safety Code, §§ 35700-35744) prohibits discrimination only in the sale or rental of public assisted housing accommodations and in any private dwelling containing more than four units. (Health & Saf. Code, §§ 35710, 35720.) Plaintiff has failed to allege facts which would bring him within either the Unruh or Rumford acts, or any other statutory provision. Not only has he failed to state a cause of action, but there is nothing in the record to suggest that he could amend his complaint to so state a cause of action under any statutory provision.

Plaintiff is further unable to plead facts which would afford him relief under any decisional law. His reliance in this connection upon *Abstract Investment Co. v. Hutchinson*, 204 Cal.App.2d 242 [22 Cal.Rptr. 309], is misplaced. In that case it was held that to make available to a discriminating landlord the aid and processes of a court in effecting a discrimination would involve the state in action prohibited by the Fourteenth Amendment.

For the foregoing reasons the judgment is affirmed.

Traynor, *C. J.*, Peters, *J.*, Trobriner, *J.*, and Burke, *J.*, concurred.

WHITE, *J.**—For the reasons stated in my dissenting opinion in *Mulkey v. Reitman*, [c]*ante*, p. .... [50 Cal. Rptr. 881, ... P.2d ....], I concur in the judgment.

McComb, *J.*, concurred.

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[c]Advance Report Citation: *Ante*, p. 557.